Notes and Comments

Counseling Draft Resistance: The Case for a Good Faith Belief Defense*

> *To the young men of America, to the whole of the American people, and to all men of good will everywhere:*
>
> *1. An ever growing number of young American men are finding that the American war in Vietnam so outrages their deepest moral and religious sense that they cannot contribute to it in any way. We share their moral outrage.*
> *2. We further believe that the war is unconstitutional and illegal.*
> . . . .
> *4. We also believe it is an unconstitutional denial of religious liberty and equal protection of the laws to withhold draft exemption from men whose religious or profound philosophical beliefs are opposed to what in Western religious tradition have been long known as unjust wars.*
> *5. Therefore, we believe on all these grounds that every free man has a legal right and a moral duty to exert every effort to end this war, to avoid collusion with it, and to encourage others to do the same. . . . Among those not in the armed forces some are applying for status as conscientious objectors to American aggression in Vietnam, some are refusing to be inducted. . . .*
> *6. We believe that each of these forms of resistance against illegitimate authority is courageous and justified.*
> . . . .
>
> —A Call to Resist Illegitimate Authority[1]

The *Call to Resist* was one of the "overt acts" which formed the basis of the indictment[2] of Dr. Benjamin Spock, the Reverend William

* This Comment grew out of papers prepared for a seminar on Selective Service law given by Professor John Griffiths, to whom the *Law Journal* is greatly indebted.

1. A Call to Resist Illegitimate Authority, August 1967 [hereinafter cited as "Call to Resist"]. It was circulated on behalf of an organization called "Resist" by Noam Chomsky, Rev. William S. Coffin, Jr., Dwight Macdonald, and Dr. Benjamin Spock; it was signed by 373 professional people and published in THE NEW YORK REVIEW OF BOOKS, Oct. 12, 1967, at 7, and THE NEW REPUBLIC, Oct. 7, 1967, at 34-35. At the trial of Dr. Spock and his co-defendants it was introduced into evidence by the Government as Exhibit 1-b. Briefs for Appellants, Appendix, at 3338-39, United States v. Spock, Nos. 7205-08 (1st Cir., July 11, 1969). [The twenty volumes of transcript, exhibits, and court papers submitted by appellants in their appeal to the First Circuit are hereinafter cited as Spock Appendix without volume number; the pagination is consecutive.]

2. Indictment, Crim. No. 68-1-F (D. Mass., Jan. 5, 1968), Spock Appendix 35.

Sloane Coffin, Jr., Mitchell Goodman, Marcus Raskin, and Michael Ferber for conspiring to counsel violation of the Selective Service law.[3] After a five-week trial in the spring of 1968 before Judge Francis Ford in Boston, a jury found all but Raskin guilty. The Court of Appeals for the First Circuit, on July 11, 1969, reversed the four convictions, but it found the "Call to Resist" to be in part "a call to unlawful refusal to be drafted"[4] and that endorsing its illegal purposes was the basis of a conspiracy to counsel, aid, and abet violation of the draft law.[5] Although they had courted arrest,[6] Dr. Spock and his co-defendants had consistently asserted their belief in the legality as well as the morality of the conduct they advised.[7] Their position thus differs significantly from that form of civil disobedience in which a concededly valid law is disobeyed in order to make a moral point. Furthermore, the defendants in *United States v. Spock* were not primarily concerned with challenging the constitutionality of the specific law which they were charged with violating—the conspiracy and counseling provisions of the draft statute.[8] Rather, they sought a judicial test of the

3. The indictment also charged conspiring to "aid and abet" violation and to "hinder and interfere" with the draft. *Id.* 31-32. This Comment will focus on the elements of the counseling offense. Yet much of what is said applies to aiding and abetting, and hindering and interfering as well, especially since in the Spock case, at least, these offenses were charged to have been committed through public conduct which was largely symbolic. For example, the only "aid" which draft registrants seem to have received from the defendants was in reporting their offense of nonpossession to the government. (The First Circuit held this to be sufficient aiding and abetting because "[w]e do not think of Coffin as one to run with the hare and hold with the hounds." United States v. Spock, Nos. 7205-08, at 22 (1st Cir., July 11, 1969).)

4. United States v. Spock, Nos. 7205-08, at 18 (1st Cir., July 11, 1969), *citing* Bond v. Floyd, 385 U.S. 116 (1966).

5. The court held that Dr. Spock must be acquitted because, while he was one of the drafters of the "Call to Resist," he was not shown to have "adhere[d] to its illegal aspects." *Id.* at 22. It found that Ferber, who did not sign the "Call," had not joined in the specific illegal agreement that the Government had prosecuted. Coffin and Goodman were not entitled to acquittals, but were given new trials because Judge Ford had improperly accompanied the request for a general verdict with ten special questions. The court held that this request abrogated "the full protection of a jury unfettered, directly or indirectly." *Id.* at 29.

6. During a speech preceding the deposit of 253 draft cards at the Justice Department on October 20, 1967, the Rev. Coffin said,

> We hereby publicly counsel these young men to continue in their refusal to serve in the armed forces as long as the war in Vietnam continues, and we pledge ourselves to aid and abet them in all the ways we can. This means that if they are now arrested for failing to comply with a law that violates their consciences, we too must be arrested, for in the sight of that law we are now as guilty as they.

Defendants' Exhibit F, *id.* 3378. *See also id.* 780, 1336-37.

7. Defendant Coffin, for instance, believed that what he counseled was "an *alleged* violation of the law." *Id.* 1618 (emphasis added). *See also* comments by Dr. Spock, *Id.* 2975-76. In addition, the "Call to Resist," which was signed by all defendants except Ferber, exhibits its signers' belief that the draft imposes an "*unconstitutional* denial of religious liberty" on registrants, that "every free man has a *legal right*" to avoid collusion with the draft system and to "encourage others to do the same." The defendants claimed to have used the statutory phrase "counsels, aids, or abets" only to dramatize the significance of the widespread opposition to the war and the draft on the part of many young men, to whom they wished to give their moral support. *Id.* 2180-81.

8. *But see* "Call to Resist," *id.* 3339. "We firmly believe that our statement is the

legality of the Vietnam war and the demands which the war and the Selective Service System make on draft registrants.[9]

These defendants are only the most celebrated of a large number of draft counselors who are leading the public debate on the draft and consulting with registrants about their Selective Service status. As counselors they may feel compelled to advise registrants to raise important constitutional objections to the requirements of Selective Service law, as well as claims that the draft law has been improperly applied in individual cases. In either situation, they give their advice in the context of a law which purports to permit judicial review of the System's determinations only at a registrant's criminal trial for refusing to submit to induction.[10] Draft counselors, therefore, often find themselves in the position of advising a registrant to "violate" the law as the only way to raise what the counselors believe are legitimate objections to the registrant's treatment by the Selective Service System.

The Department of Justice took the position in the *Spock* case that, whatever the beliefs that led them to counsel as they did, the defendants were guilty of knowingly counseling illegal behavior if their objections to the legitimacy of the war or the draft law and its regulations are not ultimately upheld by the courts.[11] This position, however, misapplies the traditional rules relating to criminal intent and ignores constitutional safeguards which protect even erroneous

sort of speech that under the First Amendment must be free, and that the actions we will undertake are as legal as is the war resistance of the young men themselves." *See also id.* 2229. In fact, the defendants stated that the "Call to Resist" was addressed to persons over draft age to encourage them to lend their moral support to draft resisters and that they never "advised" or "counseled" anyone to disobey a Selective Service duty but only supported those who, as a matter of conscience, had already decided to resist. *Id.* 1234-35, 1336, 1606-07, 1625, 2196-97, 2230, 2872, 2908.

9. *Id.* 1605, 1607.

10. Section 10(b)(3) of the Military Selective Service Act of 1967, 50 App. U.S.C. § 460(b)(3) (Supp. III, 1968), provides:

> . . . No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title, after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form: *Provided*, That such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant. . . .

But see Oestereich v. Local Bd. No. 11, 393 U.S. 233 (1968) (Section 10(b)(3) not applicable to certain statutory exemptions).

11. The Justice Department urged affirmance of District Judge Francis Ford's instructions that a good faith effort to test a law does not excuse a violation if the law is held to be valid. Brief for Appellee at 69, United States v. Spock, Nos. 7205-08 (1st Cir. July 11, 1969). Judge Ford denied defendants' proposed instructions on this point. *E.g.*, Spock Appendix 202-05, 306-08, 336-39, 359. Instead, he gave the charge requested by the prosecution, which was nearly identical to that disapproved by the Supreme Court in Keegan v. United States, 325 U.S. 478 (1945). Spock Appendix 3226-27. *See* United States v. Spock, Nos. 7205-08, at n.29 (1st Cir., July 11, 1969) (question left unresolved).

statements. To the charge of counseling violations of the Selective Service law there should be a defense of "good faith belief": defendants should be excused if they sincerely believed that the conduct which they counseled either was legal under the Selective Service law or was constitutionally protected despite the apparent commands of the Act.[12]

This Comment will show that the good faith belief defense may be derived from the rules of criminal intent and that this result is supported and further compelled by constitutional considerations of vagueness and free speech, by the demands of the right to counsel, and by emanations of the recent "right to litigate" cases.

I. The Statute

The statutory basis of prosecutions for counseling draft resistance is Section 12(a) of the Military Selective Service Act of 1967:

> [*A*]*ny person . . . who knowingly counsels, aids, or abets another to refuse or evade registration or service in the armed forces or any of the requirements of this title, or of said rules, regulations, or directions,* . . . or who conspires to commit any one or more of such offenses, shall . . . be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both . . . .[13]

Judicial interpretation of the statute has for the most part declined opportunities to restrict its sweep; instead the federal courts have extended the reach of the counseling provision well beyond the limits suggested by its common law and statutory background.

A. *The Background of "Counseling"*

At common law, "counseling" referred to two different criminal statuses: accessories before the fact and solicitors.[14] Accessories before the fact, like aiders and abettors, were accomplices to a completed crime[15] and were punished as harshly as the principals.[16] But stringent require-

12. This Comment will consider only belief that conduct is *legally* justified. On the continuity between legal and moral beliefs, see Dworkin, *On Not Prosecuting Civil Disobedience*, N.Y. REV. OF BOOKS, June 6, 1968, at 14. The phrase "good faith belief" is redundant, but it will be used for emphasis.

13. 50 App. U.S.C. § 462(a) (Supp. III, 1968) (emphasis added).

14. 2 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 229-30 (1883); G. WILLIAMS, CRIMINAL LAW, THE GENERAL PART 362, 612 (2d ed. 1961).

15. 2 J. STEPHEN, HISTORY, *supra* note 14, at 231. G. WILLIAMS, *supra* note 14, at 362.

16. 4 BLACKSTONE, COMMENTARIES *39; 2 J. STEPHEN, HISTORY, *supra* note 14, at 231. The federal rule has abolished the largely verbal distinction between "principal" and

ments of proof had to be met to convict a counselor as an accessory. Not only did speech counseling a crime have to be followed by commission of the crime counseled,[17] but the counsel had to be specific—not, say, advocacy of the merits of burglary as a career.[18] Thus, a close causal link between counsel and action was necessary.[19] Furthermore, a counselor was liable only for conduct he might fairly be said to have authorized, not for acts committed in consequence of his counsel but beyond what he recommended.[20] As an accessory before the fact, the counselor was also protected by an intent standard which required that an accomplice know all the material facts constituting the principal crime, "even if the crime counseled was one of strict liability."[21]

Long after the category of accessory before the fact was incorporated into the common law,[22] counseling which did not result in a completed crime became the misdemeanor of solicitation,[23] over objections that punishing such speech was like punishing "mere intent."[24] The crime was complete with the utterance of guilty speech; no effect had to follow, or even be probable.[25]

"accessory" (which, indeed, was recognized only for felonies at common law) and declared that accessories before the fact and aiders and abettors are all to be called, as well as punished as, principals. 18 U.S.C. § 2 (1964).

17. The early rule actually required conviction of the principal perpetrator before conviction of the accomplice. 2 J. STEPHEN, HISTORY, *supra* note 14, at 232, 235-36. It was modified by 24 & 25 Vict. 94, §§ 1 & 2 (1861).

18. G. WILLIAMS, *supra* note 14, at 365-66.

19. The commentators who have discussed the need for proof of cause in fact where there has been counsel and then crime suggest that it should be required, though the issue has seldom arisen. *See, e.g.*, 1 F. WHARTON, CRIMINAL LAW § 265, at 339-41 (11th ed. 1912); H.L.A. HART & A. HONORE, CAUSATION IN THE LAW 357 (1959) (quoting J. Stephen); G. WILLIAMS, *supra* note 14, at 381-83; *cf.* State v. King, 104 Iowa 727, 74 N.W. 691 (1898) (instigating effect on another necessary to show agreement in conspiracy).

20. A counselor would be liable for a mistake or miscarriage in following his advice, J. STEPHEN, A DIGEST OF THE CRIMINAL LAW 34-35 (1894); or for conduct fairly included in the enterprise suggested, M. HALE, HISTORY OF THE PLEAS OF THE CROWN 617 (Wilson ed. 1778); G. WILLIAMS, *supra* note 14, at 401-03. But he apparently would not be liable if he counseled murder of *A* and the means he suggested were used to murder *B* instead. Regina v. Saunders & Archer, 2 Plowd. 473, 75 Eng. Rep. 706 (1575). Nor if he counseled mere theft would he be liable for a burglary. M. HALE, *supra*, at 616-17; G. WILLIAMS, *supra*, at 401-02.

21. G. WILLIAMS, *supra* note 14, at 394; *cf.* National Coal Board v. Gamble, 3 All. E.R. 203, 209 (Q.B. 1958).

22. The law of accomplices, even by Learned Hand's standards, "goes back a long way" —to the beginning of the fourteenth century, at least. United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938), *citing* 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 507 (1st ed. 1895). Solicitation was not fully established until 1801. *See* authorities cited note 24 *infra*.

23. Regina v. Gregory, L.R. 1 Cr. Cas. Res. 77 (1867); 2 J. STEPHEN, HISTORY, *supra* note 14, at 230; 1 J. BISHOP, NEW COMMENTARIES ON THE CRIMINAL LAW 409 (1892). Solicitation to treason, which was itself treason, and solicitation to mutiny were punishable by death. J. STEPHEN, DIGEST, *supra* note 20, at 44-45, 47-48.

24. Rex v. Higgins, 2 East 5, 102 Eng. Rep. 269 (1801), *repudiating* Regina v. Daniell, 6 Mod. 99, 87 Eng. Rep. 856 (1704); *see* Curran, *Solicitation: A Substantive Crime*, 17 MINN. L. REV. 499, 504-05 (1933); Blackburn, *Solicitation to Crimes*, 40 W. VA. L.Q. 135 (1934).

25. Regina v. Most, 7 Q.B.D. 244 (1881); Regina v. Gregory, L.R. 1 Cr. Cas. Res. 77

"Counseling" in federal law is outlawed primarily in its accessorial sense.[26] The federal aiding and abetting statute provides that "[w]hoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces or procures its commission is a principal."[27] This provision has been interpreted to follow the common law definition and reach only accomplices in completed crimes.[28] In one respect, American courts have narrowed the criminal liability of accomplices. The trend in federal courts is to require, not only knowledge of facts material to the principal offense, but a conscious purpose (sometimes labeled a "specific intent") to further the illegal endeavor.[29]

The few federal solicitation laws are identified by distinctive wording which makes plain their intent to reach even counsel which has not been effective.[30] Though solicitation law is not extensive, its history has been explosive. While accessory provisions have not raised constitutional problems, state and federal solicitation laws are a staple of first amendment litigation.[31] The reasons are obvious. Solicitation prosecutions involve substantial guesswork about the potential effects of words. The "danger" and "value" of the speech in such cases must be analyzed abstractly, with only a general context and general principles as guides,[32] while accessory prosecutions, by contrast, start with completed crimes.

(1867); Commonwealth v. Flagg, 135 Mass. 545 (1883); State v. Schleifer, 99 Conn. 432, 121 A. 805 (1923); Regina v. Krause, 66 J.P. 121 (1902).

26. The notable exceptions are solicitation to various forms of disloyalty, prohibited by 18 U.S.C. §§ 2385, 2387, 2388 (1964). *See* text *infra*.

27. 18 U.S.C. § 2(a) (1964).

28. United States v. Horton, 180 F.2d 427 (7th Cir. 1950); Karrell v. United States, 181 F.2d 981 (9th Cir. 1950); *cf.* Krulewitch v. United States, 336 U.S. 440, 450 (1949) (concurring opinion). This rule has been applied to specific provisions in other federal statutes. *E.g.*, United States v. Mills, 32 U.S. 138 (1833) (post office offenses); *cf.* 18 U.S.C. § 752 (1964) (escape of federal prisoners).

29. *E.g.*, United States v. Peoni, 100 F.2d 401 (2d Cir. 1938) (L. Hand, J.); Morei v. United States, 127 F.2d 827 (6th Cir. 1942); Robinson v. United States, 262 F.2d 645 (9th Cir. 1959). *Contra*, Backun v. United States, 112 F.2d 635, 637 (4th Cir. 1940). The *Peoni* rule has been cited with approval by the Supreme Court, Nye & Nissen v. United States, 336 U.S. 613, 619 (1949), and, after controversy, adopted by the Model Penal Code. MODEL PENAL CODE § 2.06(3)(a) (Proposed Official Draft 1962); *see* Wechsler, Jones & Korn, *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, & Conspiracy, II*, 61 COLUM. L. REV. 957, 968-71 (1961).

30. *E.g.*, 18 U.S.C. § 2387 (1964): "advises, counsels, urges, or in any manner causes or attempts to cause . . . ."

31. *See, e.g.*, Brandenburg v. Ohio, 37 U.S.L.W. 4525 (U.S., June 9, 1969), *overruling* Whitney v. California, 274 U.S. 357 (1927); Dennis v. United States, 341 U.S. 494 (1951); Herndon v. Lowry, 301 U.S. 242 (1937); Gitlow v. New York, 268 U.S. 652 (1925); Abrams v. United States, 250 U.S. 616 (1919); Schenck v. United States, 249 U.S. 47 (1919).

32. Dennis v. United States, 341 U.S. 494 (1951), epitomizes the approach and its hazards.

B. *Legislative History*

The Selective Service Act of 1917 had no specific counseling provisions.[33] The present counseling provision first appeared in the 1940 Act.[34] There are three strong indications that it was intended to be an accessory law only: (1) the phrasing of the section, "knowingly counsels, aids, or abets," suggests it is an accessory provision since "aid and abet" refers only to accomplices;[35] (2) its source was the federal aider and abettor statute,[36] which applies to counselors only if they are accessories;[37] and (3) Congress, in drafting the counseling provision, gave no independent indication that the provision was intended to create a new offense—the legislators apparently thought they were merely codifying past practice.[38]

Furthermore, the legislative history of the Act suggests that by prohibiting only *"knowing"* counsel Congress intended to recognize constitutional protections and limit the reach of the counseling provision. The first draft of the 1940 Act, introduced into the Senate on June 20th and referred to the Committee on Military Affairs for hearings, enlarged on the 1917 Act by providing for punishment of "any person . . . who counsels, aids, or abets another to evade registration or service or any [other] requirements . . . ."[39] After numerous objections to the sweep of the penalty provisions were raised during the hearings,[40] "knowingly" was added before the definitions of four

33. It directly punished only those who "evade[d] or aid[ed] another to evade the requirements of this Act or of [its] regulations." Act of May 18, 1917, ch. 15, § 6, 40 Stat. 81.

34. Selective Service and Training Act of 1940, ch. 720, § 11, 54 Stat. 894.

35. *Cf.* Shuttlesworth v. City of Birmingham, 373 U.S. 262 (1963); Krulewitch v. United States, 336 U.S. 440, 450 (1949) (concurring opinion). Solicitation statutes, moreover, usually make it explicit that counsel need not have been effective. *See, e.g.*, note 30 *supra;* 24 & 25 Vict., c. 100, § 4 (1861) ("solicit, encourage, persuade, or endeavour to persuade, or . . . propose to [another]").

36. *See* note 38 *infra.*

37. *See* p. 1013 *supra.*

38. According to the only legislative history of Section 11, it "contains the penalty provisions of the bill, which are substantially the same as those of the World War Act. Experience with the World War provisions shows that they worked satisfactorily in providing the necessary protection." 86 CONG. REC. 10095 (1940). This remark, by Senator Morris Sheppard, Chairman of the Senate Committee on Military Affairs, was quite reasonably made the basis for an interpretation by the Supreme Court that the penalty clause "was designed to catalogue the various offenses against the Act." Singer v. United States, 323 U.S. 338, 343, 348-49 (1945); *cf.* SEL. SERV. L. REP. PRACTICE MANUAL ¶ 2602 (1968). *But see* Singer v. United States, 323 U.S. 338, 344 (1945). *See also id.* at 348-49 (Frankfurter, J., dissenting).

39. *Hearings on S. 4164 Before the Senate Comm. on Military Affairs*, 76th Cong., 2d Sess. 3 (1940).

40. Objection to the enforcement provisions of the original bill was voiced mainly by representatives of religious groups appearing before the Senate Military Affairs Committee to testify concerning the problem of the conscientious objector. The contention of this group, as evidenced by their testimony, was that anyone engaged in religious work who might counsel a conscientious objector subject to induction

criminal acts.[41] While the Senate apparently thought this explicit protection of counselors unnecessary, witnesses at the House hearings on the bill were less sanguine. Robert Handschin of the National Farmers' Union expressed the sentiments of many:

> The loose language of section 10 of the bill would allow no criticism in any form whatsoever, direct or indirect, of this law, while it was on the statute books, outside of the Congress. We contend that such military dictatorship could become the greatest threat to civil liberties in this country that we have ever seen—not barring the unfortunate experiences which took place between 1917 and 1920.
>
> We believe the fullest guarantees should be given for allowing the citizens of this country to question at all times the policies, both of Congress and of the defense officers entrusted by the citizens with the task of defending the country, so long as the use of such civil liberties does not directly violate the actual workings of our defense laws.[42]

under the act to follow the dictates of his own conscience in deciding whether to refuse military service might be liable to fine and imprisonment under the pending legislation.

2 SELECTIVE SERVICE SYSTEM, THE SELECTIVE SERVICE ACT 668 (Special Monograph No. 2, 1954) [hereinafter cited as SELECTIVE SERVICE MONOGRAPH No. 2].

The following are illustrative of the attitudes of these religious and civil liberties leaders:

> Section 10 of this bill does more than hint at doing away with free speech, free press, free assembly, even free conscience. Anyone who counsels, aids, or abets another in evading conscription is liable to fine and imprisonment.
>
> Certainly as editor of a paper which has been in existence for 8 years, I look with grave apprehension at this denial of our natural rights. If we feel obliged in conscience to oppose and continue to oppose what we consider to be an unjust, un-American, and tyrannic law, then we are in danger of having our work wiped out, of imprisonment and fine.

Senate Hearings, supra note 39, at 154-55 (testimony of Miss Dorothy Day, Editor of the *Catholic Worker*).

> Our ministers who by our church law have the right to counsel with conscientious objectors and to give them the spiritual existence of the church are guilty under the provisions of this bill, for they may easily be construed by a hostile administration as one "who counsels, aids, or abets another to evade registration or service in the land and naval forces" under the provisions of this act.

Id. 262 (testimony of Rev. John M. Swomley, Jr., of the National Council of Methodist Youth).

41. SELECTIVE SERVICE MONOGRAPH No. 2, at 669-72.

42. *Hearings on H.R. 10132 Before the House Comm. on Military Affairs*, 76th Cong., 3d Sess. 283 (1940). One witness proved a better prophet than Senator May, Chairman of the House Committee, of the difficulties which the section would present.

> Miss DETZER. Finally, I want to mention this section 10 in the bill under article X, and which I do not understand, and I wonder how it will be interpreted, and that is the part which states, "Whoever counsels, aids, or abets the registration." Now, how is it going to be decided what counsels, aids, or abets? If I make a speech against war, will it be counseling, aiding, or abetting? If I write a pamphlet, what does that mean? Who is going to make the decision? What about a mother who counsels her son or aids him in not registering? What does that provision mean as to the penalty of 5 years.
>
> I do not want to see you start abridging free speech in peacetime. There is no end to where it may go.
>
> I think for the sake of democracy opposition is vitally important. If there had been

To overcome these objections, the House Committee added "knowingly" in five places,[43] among them before the "counsels, aids, or abets" clause.[44] The Conference Committee combined the Senate and House additions of "knowingly,"[45] and in the final bill, which was enacted on September 16, 1940, "knowingly" appeared in six places.[46] The Selective Service System has interpreted the addition of "knowingly" to mean "that the actions of an individual charged with violating the law were in themselves not sufficient evidence; it had to be shown that he performed the act knowingly, that is deliberately or wilfully."[47] In all subsequent re-enactments of the Selective Service law, the requirement that counseling be done "knowingly" has remained unchanged.[48]

C. *Judicial Interpretation*

There are only a few reported cases interpreting the draft law's counseling provision.[49] For the most part, the courts have increased

no opposition, probably they would still have Chamberlain and what would have happened no one knows. The minute you abridge free speech you abridge opposition, and that is what is underneath. That section should be stricken out from this bill.

The CHAIRMAN. That is a statute which provides for dealing with persons who obstruct this program in violation of the law when it is enacted.

For instance, when I am sitting on my front porch down in Kentucky and my neighbor boy comes in from out of the creek in the Kentucky mountains and says something to me, "I have been called to the Army." I say, "Go hide in a cave in the cliff." Then I am guilty of violating the law.

Miss DETZER. Just exactly as Mr. [Harry Emerson] Fosdick may be, only he has raised the question how it may be done. How are you going to know by what counsels, aids, and abettings? That may be anything.

The CHAIRMAN. Those terms are well defined.

Miss DETZER. I know they are legal terms, but you can stretch any law.

The CHAIRMAN. You can stretch any law, but nobody can stretch this one. It will be enforced by the courts.

Id. 377.

43. "The influence of such testimony on the executive deliberations of the House committee becomes apparent after a glance at the section as reported out of the committee." SELECTIVE SERVICE MONOGRAPH No. 2, at 674.

44. *Id.* 676.

45. *Id.* 681-83.

46. Act of Sept. 16, 1940, ch. 720, 54 Stat. 885, 894-95.

47. SELECTIVE SERVICE SYSTEM, ENFORCEMENT OF THE SELECTIVE SERVICE LAW 20 (Special Monograph No. 14, 1950).

48. 50 App. U.S.C. § 462(a) (1964), *as amended*, (Supp. III, 1968).

49. Keegan v. United States, 325 U.S. 478 (1945); Gara v. United States, 178 F.2d 38 (6th Cir. 1949), *aff'd by an equally divided Court*, 340 U.S. 857 (1950); Warren v. United States, 177 F.2d 596 (10th Cir. 1949), *cert. denied*, 338 U.S. 947 (1950); Okamoto v. United States, 152 F.2d 905 (10th Cir. 1945); Butler v. United States, 138 F.2d 977 (7th Cir. 1943); Baxley v. United States, 134 F.2d 937 (4th Cir. 1943); United States v. Coffman, 50 F. Supp. 823 (S.D. Cal. 1943). *Keegan* and *Okamoto* are discussed in the following section. *Butler* and *Coffman* were not centrally concerned with the draft law's counseling provision; the former focused mainly on the other count of the indictment, which was drawn under the counseling section of the Espionage Act, now 18 U.S.C. § 2388 (1964), and the latter dealt primarily with a scope-of-search question and commented on the substantive charge only to say: "The wilfullness required of one who counsels, aids and abets another to evade

the statute's reach by abandoning the limits which its background suggests are appropriate. In *Baxley v. United States*,[50] a World War II counseling prosecution, the Fourth Circuit defined "counsel" broadly, going beyond the natural sense of the word as well as previous attempts to restrict its scope.[51] The court declared, "It is not even essential that Baxley should have directly and expressly urged his hearers to evade service or registration, if such evasion was the normal and natural consequence of his words to those who heard and believed them."[52]

The two most recent cases under the counseling provision departed entirely from the most basic limitation on conviction as an accessory; to convict a counselor under the draft law the government apparently no longer need show that his speech led to a completed substantive violation. In *Warren v. United States*,[53] the Tenth Circuit upheld a stepfather's conviction for counseling draft evasion, even though his stepson had rejected the advice that he not register. In *Gara v. United States*,[54] a college dean was convicted for telling a student who was about to be arrested for failing to register, "Don't let them coerce

service in the land and naval forces of the United States is not a general ideological opposition to war . . . but the evil design to do the particular act denounced by Section 311, Title 50 U.S.C.A. Appendix [*now* 50 App. U.S.C. § 462(a) (Supp. III, 1968)]." 50 F. Supp. at 826.

50. 134 F.2d 937 (4th Cir. 1943).

51. "Counsel" has seldom been explicated. Learned Hand's offering in Masses Pub. Co. v. Patten, 244 F. 535, 540 (S.D.N.Y. 1917), *rev'd*, 246 F. 24 (2d Cir. 1917), is perhaps the best.

> To counsel or advise a man to an act is to urge upon him either that it is his interest or his duty to do it. While, of course, this may be accomplished as well by indirection as expressly, since words carry the meaning that they impart, the definition is exhaustive, I think, and I shall use it. Political agitation, by the passions it arouses or the convictions it engenders, may in fact stimulate men to the violation of law. Detestation of existing policies is easily transformed into forcible resistance of the authority which puts them in execution, and it would be folly to disregard the causal relation between the two. Yet to assimilate agitation, legitimate as such, with direct incitement to violent resistance, is to disregard the tolerance of all methods of political agitation which in normal times is a safeguard of free government.

244 F. at 540. *But cf.* F. WHARTON, CRIMINAL LAW §§ 265-66 (12th ed. J. Ruppenthal 1932). Judge Hand could have cited Stephen for support:

> Suppose, for instance, A tells B of facts which operate as a motive to B for the murder of C. It would be an abuse of language to say that A had killed C, though no doubt he had been the remote cause of C's death. . . . In Othello's case, for instance, I am inclined to think that Iago could not have been convicted as accessory before the fact to Desdemona's murder, but for the single remark: "Do it not with poison, strangle her in her bed."

3 J. STEPHEN, HISTORY, *supra* note 14, at 8.

52. 134 F.2d at 938-39. This standard would encompass speech clearly protected by the first amendment as well, if there is any truth in Holmes's aphorism "Every idea is an incitement." Gitlow v. New York, 268 U.S. 652, 673 (1925) (dissenting opinion); *see, e.g.*, Yates v. United States, 354 U.S. 298, 312-27 (1957). The court also rejected Baxley's claim that since he was a devout Jehovah's Witness preaching his religious beliefs he should be protected by the free exercise clause. If speech or conduct opposed to the draft were recognized as religious expression, it would then merit constitutional protection, subject only to a sincerity test. *Cf.* United States v. Ballard, 322 U.S. 78 (1944).

53. 177 F.2d 596 (10th Cir. 1949), *cert. denied*, 338 U.S. 947 (1950).

54. 178 F.2d 38 (6th Cir. 1949), *aff'd by an equally divided Court*, 340 U.S. 857 (1950).

you into registering." There was evidence of a completed crime in *Gara,* though the Sixth Circuit, in upholding the conviction, said there need not have been.[55] This was probably not mere dictum, since there was no evidence that Dean Gara's advice had in any way prompted the student's conduct, and it is therefore doubtful that all the elements of an accessorial offense had been made out.[56] In effect, judicial interpretation has both changed the counseling prohibition from an accessory to a solicitation law and severely lowered the test for a solicitation.[57]

55. 178 F.2d at 40. The court took it as settled law that "where an attempt to obstruct military service, as well as actual obstruction, is penalized by statute, there is 'no ground for saying that success alone warrants making the act a crime,' " citing Schenck v. United States, 294 U.S. 47 (1919). But while the statute involved in *Schenck* makes it a crime to obstruct or *attempt to obstruct* the recruiting or enlistment service of the United States, 18 U.S.C. § 2388 (1964), to assert that the counseling provision punishes attempts is to assume what has to be proved.

56. *See* note 19 *supra.* The court declared that Dean Gara's advice had affected the registrant's decision because, although the registrant had initially violated the act two months *before* the Dean's statement to him (*i.e.,* on the date he first became liable to register but refused to do so), he committed another crime every day by continuing to refuse; in speaking to the registrant on the day he was arrested, Dean Gara "encouraged" the registrant not to register thereafter. 178 F.2d at 40.

57. Interpretation of the draft law's conspiracy provisions has followed the permissive trend of the draft counseling cases.

Prior to 1940, conspiracy charges had to be brought under Section 4 of the Espionage Act, now 18 U.S.C. § 2388 (1964), or under one of the two general federal conspiracy laws. Section 37 of the Criminal Code, now 18 U.S.C. § 371 (1964), punishes conspiracies "to commit any offense against the United States, or to defraud the United States, or any agency thereof . . . ." Section 6 of the Criminal Code, now 18 U.S.C. § 2384 (1964), punishes conspiracies "by force to prevent, hinder, or delay the execution of any law of the United States." Cases applying these provisions to the draft law are Ruthenberg v. United States, 245 U.S. 480 (1918); Goldman v. United States, 245 U.S. 474 (1918); Fraina v. United States, 255 F. 28 (2d Cir. 1918); Reeder v. United States, 262 F. 36 (8th Cir. 1919), *cert. denied,* 252 U.S. 581 (1920). *But see* Haywood v. United States, 268 F. 795, 799 (7th Cir.), *cert. denied,* 256 U.S. 689 (1921).

The conspiracy provision added to the draft law in the Selective Service and Training Act of 1940 reached "any person or persons who shall knowingly hinder or interfere in any way by force or violence with the administration of this Act or the rules or regulations made pursuant thereto, *or conspires to do so.*" Act of Sept. 16, 1940, ch. 720, § 11, 54 Stat. 895 (emphasis added). In Singer v. United States, 323 U.S. 338, 340 (1945), the Supreme Court declined to limit this provision to conspiracies to hinder or interfere by force or violence, which would have made it substantially an incorporation of Section 6 of the Criminal Code. Instead, it held that "or conspires to do so" reached conspiracies to violate any part of the penalty provision. In 1948 the Act was amended and the words "or conspires to do so" changed to the present wording, "who conspires to commit any one or more of such offences," in order to "incorporate judicial determinations made pursuant to the [1940] Act." S. REP. No. 1268, 80th Cong., 2d Sess. 40 (1948); *see* 50 App. U.S.C. § 462(a) (Supp. III, 1968).

While this extension of the draft law's conspiracy provision did not reach conspiracies which had previously been legal, it did have the indirect effect of relaxing the standards of proof in conspiracy cases, standards which were already very low. Goldstein, *Conspiracy to Defraud the United States,* 68 YALE L.J. 405, 406 (1959); Krulewitch v. United States, 336 U.S. 440, 446-48 (1949) (concurring opinion). Section 37 of the Criminal Code, 18 U.S.C. § 371, required proof of an "overt act" to effect the object of the conspiracy; in *Singer,* however, the Court held that the draft law punished conspiracies "on a common law footing," and that proof of an overt act was, therefore, not required. 323 U.S. at 340 (1945). The elements of conspiracy under the draft law are thus entirely mental—an

II. *Keegan v. United States* and the Good Faith Belief Defense

In *Keegan v. United States*,[58] the Supreme Court made the major judicial effort to limit the scope of the Selective Service Act's counseling provision. The Court's solution to some of the problems of the Act is a tentative step toward recognition of the good faith belief defense as a necessary safeguard for draft counselors.

The defendants in *Keegan* were officers of the German-American Bund prior to and during World War II. They had lobbied in Congress against Section 8(i) of the 1940 draft act,[59] which declared it the policy of Congress that Bund members should not be hired to fill job vacancies created by the induction of other workers. When Section 8(i) was enacted, the defendants in *Keegan* declared that it was unconstitutional and that conscription could not, therefore, be constitutionally imposed upon Bund members: "No Civil Rights—No Military Duty! Draft Exempts Bund Members!"[60] In "Command No. 37" the Bund ordered its members to register for the draft but to refuse military service until a determination had been made of the constitutionality of Section 8(i) and announced that they were planning to bring a "test case" to vindicate the rights of Bund members.[61]

"act" of agreement and a guilty plan or intention. *See Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920, 925-56 (1959); Harno, *Intent in Criminal Conspiracy*, 89 U. PA. L. REV. 624 (1941). *See also* United States v. Spock, Nos. 7205-08 (1st Cir., July 11, 1969), in which the bulk of the opinion is concerned with specific intent, which the court found required by Scales v. United States, 367 U.S. 203 (1961).

> When the alleged agreement is both bifarious and political within the shadow of the First Amendment, we hold that an individual's specific intent to adhere to the illegal portions may be shown in one of three ways: by the individual defendant's prior or subsequent unambiguous statements; by the individual defendant's subsequent commission of the very illegal act contemplated by the agreement; or by the individual defendant's subsequent legal act if that act is "clearly undertaken for the specific purpose of rendering effective the later illegal activity which is advocated." [Citing *Scales* at 234.]

United States v. Spock, *supra*, at 11-12.

58. 325 U.S. 478 (1945).

59. Act of Sept. 16, 1940, ch. 720, § 8(i), 54 Stat. 892:

> It is the expressed policy of the Congress that whenever a vacancy is caused in the employment rolls of any business or industry by reason of induction into the service of the United States of an employee pursuant to the provisions of this Act such vacancy shall not be filled by any person who is a member of the Communist Party or the German-American Bund.

60. Quoted, 325 U.S. at 497 (concurring opinion).

61. Bund Command No. 37, quoted in 325 U.S. at 484-85:

> 4. *Military Service:* On October 16, of this year, all citizens and non-citizens (male) who are of age, but who have not passed their 36th year, must register with the military authorities. This order must be complied with unhesitatingly.
>
> We represent the standpoint, however, that AN INDUCTION into the MILITARY SERVICE is NOT justified, in as far it concerns Bund members and American Germans, *for in the Selective Service Law the citizenship rights of Bund members and the defenders of Germandom are unconstitutionally severed!*
>
> EVERY MAN, if he can, will REFUSE *to do military duty until this law and all*

There was, however, evidence that even prior to the addition of Section 8(i) to the Selective Service bill, the Bund, although favoring compulsory service, "feared that the President might use a conscript army by sending it abroad to fight with England, against Germany."[62] Bund leaders had also indicated that they would refuse to fight in such a war.[63]

Keegan and other Bund officers were charged with conspiring to counsel Bund members, in the words of the 1940 statute, "to evade registration or service" in the military.[64] At trial, they asserted as a defense their good faith belief that the actions which they had counseled were legal—that Bund members, unconstitutionally discriminated against by Section 8(i), were not obligated to serve under the draft law. The trial judge instructed the jury that the defendants' good faith belief that the law was not binding upon those whom they counseled was no defense under the law, and the jury found them guilty.

The Supreme Court, by a 5-4 vote, reversed the conviction. Justice Roberts, announcing the judgment of the Court in an opinion in which Justices Frankfurter and Murphy concurred, found that the Command did not "in itself" amount to counseling, even taking account of the defendants' disapproving attitude toward American participation in the war and their statements to that effect.[65] A substantial part of Justice Roberts's opinion and most of Chief Justice Stone's dissent analyze the meaning of the word "evade" in the prohibition of knowing counsel "to *evade* registration or service." The opinions differ as to whether the Bund command counseled "evasion" or "merely refusal" which "is not made criminal by the Act," and the dissent seems to have the better of the dispute.[66] If the distinction

other laws of the country or the states which confine the citizenship rights of Bund members ARE REVOKED!

We will fight to establish a precedent in this servile matter! [Emphasis in original.]

62. 325 U.S. at 483.

63. "The witness stated that he said to Belohlavek: 'Joe, you are in the draft aren't you? He said, "Yes." I said, "What are you going to do if they send you to the other side?" So he said, "Well"—it was a vulgar word—"I will run to the other side and fight against them".'" 325 U.S. at 489. *See also* Statements of defendants Keegan and Klapprott, *id.* at 489-90.

64. Act of Sept. 16, 1940, ch. 720, § 11, 54 Stat. 895.

65. 325 U.S. at 494-95.

66. Justice Roberts argued that "evade" encompassed only fraudulent and secret schemes to elude a recognized obligation. Chief Justice Stone thought it reached all failures to register or serve when required to do so. As the Chief Justice pointed out, the distinction is unclear. The Latin root of "evade" means "avoid," 325 U.S. at 501-02, and the term seems broad enough to cover any failure to perform a required duty. And Justice Roberts could not really be suggesting that *any* counseling of refusal is legal. For instance, counsel to refuse an order to report for induction is not legal in anyone's view

between evasion and refusal were the sole ground for the decision, *Keegan* would now be obsolete, for in 1948 Congress amended the draft law to make it illegal to counsel "refusal" as well as "evasion" of any duty under the Act.[67] But Justice Roberts's opinion is not restricted to the evade-refuse issue. The Government's conspiracy charge also rested on "a sinister and undisclosed intent," in connection with Command No. 37, to counsel evasion.[68] The meager evidence of this intent was undercut, according to Justice Roberts, by the defendants' belief that the Act was unconstitutional, even though that belief was erroneous, and his language seems to go further than necessary to defeat the conspiracy charge:

> One with innocent motives, who honestly believes a law is unconstitutional and, therefore, not obligatory, may well counsel that the law shall not be obeyed; that its command shall be resisted until a court shall have held it valid, but this is not knowingly counselling, stealthily and by guile, to evade its command.[69]

In his concurrence, Justice Black pursued this theme; he examined the basis for defendants' beliefs about the Act at length in order "to distinguish between honest objections directed at legitimate wrongs, and sham protests which only obscure the real purpose."[70] His interest in the constitutional arguments made by the defendants clearly went to whether they were honestly believed as well as to whether they were correct.[71]

At the heart of Justice Roberts's opinion is a declaration of the importance of the defendants' "honesty and bona fides" in their belief about the legality of their conduct.[72] But neither Justice Roberts nor

if there is no claim of exemption but if, instead, the counselor wants to obstruct the operation of the system or decides that refusal to comply with the law is justified on general principle. On the other hand, the addition of "refuse" to the provision only creates confusion since registrants are entitled, now as in 1945, to refuse illegal demands to serve, and counselors may so advise them. *See* p. 1028 *infra*.

67. 50 App. U.S.C. § 462(a) (Supp. III, 1968). The provision as amended in 1948 is still in force, substantially unchanged.

68. 325 U.S. at 488.

69. *Id.* at 493-94. Justice Roberts suggested that reasonableness of belief was irrelevant: "The belief that validity of the other provisions of the Act depends on the validity of [Section 8(i)] may seem foolish to us, but can we say that the other defendants did not believe what the Bund's lawyer told them about that?" *Id.* at 487.

70. *Id.* at 496 (Black, J., concurring).

71. Because he joined Justice Roberts in finding that defendants' beliefs made the evidence insufficient to support convictions, he was "not compelled to pass on this grave constitutional challenge [the invalidity of the Act due to Section 8(i)]." *Id.* at 495 (Black, J., concurring).

72. *Id.* at 493. On the matter of belief, the trial judge had instructed the jury that "if there was a *conspiracy amongst these defendants, or any of them, having as its object the violation of the Selective Service Law, knowingly*, the reason for such violation is immaterial to you in your consideration of the question of their guilt or innocence." *Id.*

Justice Black was careful to distinguish what was relevant to a charge of counseling, or even attempting to counsel, from what was relevant to conspiracy.[73] Dictum and holding seem to be inextricably intertwined. In any event, Justice Roberts was unable to convince a majority of the Court that only those who intend to achieve an end they know to be illegal come within the counseling prohibition. Justice Rutledge cast the decisive vote on the additional theory that the speech involved was "sheer political discussion."[74]

III. *Mens Rea* in the Crime of Counseling

While Justices Roberts and Black were impressed by the good faith of the defendants in *Keegan*, they failed to explain fully the reasons they found it relevant. The majority did not reach the obvious starting place for an argument that the defendants' conduct should be excused because of their beliefs; the doctrine of *mens rea* responds to the concern that innocent commission of crime should not be punished, and it provides a foundation for a good faith belief defense to a charge of counseling draft offenses.

A. *The Theory*

The requirement of *mens rea*, the Supreme Court has declared, "is no provincial or transient notion. . . . It is as universal and per-

(emphasis in original). The Court was unhappy with this formulation: "Here the honesty and bona fides of the defendants is said to be immaterial; the fact that they desired to test the constitutionality of the law is said to be immaterial." *Id.* The Supreme Court's conclusion suggests that counsel cannot be knowing when it is done in the belief that those counseled had bona fide grounds to object to their treatment by the Selective Service System which would justify their noncompliance with the provisions of the Act. This view of *Keegan* has been taken in the circuits. The most important such decision is Okamoto v. United States, 152 F.2d 905 (10th Cir. 1945), which involved Japanese-Americans who were relocated during World War II from the Pacific coast to a Heart Mountain, Wyoming, detention camp. They protested their relocation by conspiring to counsel registrants in their number against going to the induction center as ordered. In reversing their convictions, the Tenth Circuit explicitly recognized "the right of one to counsel in good faith and with innocent motives non-compliance with a law honestly believed to be unconstitutional and for that reason not obligatory." *Id.* at 908. The Eighth Circuit gave *Keegan* a similar reading, but distinguished it and *Okamoto* in Holdridge v. United States, 282 F.2d 302 (8th Cir. 1960) (affirming conviction for trespassing on defense installation after warning that the conduct was illegal).

73. Neither opinion refers to the argument made by defendants and rebutted in the dissent that conspiracy requires a particular sort of "corrupt" intent. Consolidated brief of all petitioners represented by assigned counsel 67-74; 325 U.S. at 506. The good faith of the defendants was variously used to show *what* was counseled ("refusal," not "evasion"), *how* it was counseled (openly, not stealthily), and the innocent *purpose* of the agreement to counsel (honest, not sinister and undisclosed).

74. *Id.* at 498 (concurring opinion). Justice Rutledge's concurrence can be seen as very close to the prevailing opinion of Justice Roberts, for he may be understood as declaring that one who engages in "sheer political discussion" does not have the requisite intent to counsel violation of a law, a view which combines theories of criminal intent and the protection of free speech. *See* Part V *infra*.

sistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil."[75] As a general matter, the requirement is that conduct be done "intentionally," but the importance of the concept has not often been matched by the clarity of its exposition.[76] The Model Penal Code[77] has attempted to unravel different strands of the requirement, and it makes clear much that traditional analysis obscures.[78]

75. Morissette v. United States, 342 U.S. 246, 250 (1952). The *mens rea* requirement has been explicitly abandoned in the "strict liability" cases, which the Court took pains to distinguish. *E.g.*, United States v. Balint, 258 U.S. 250 (1922); United States v. Dotterweich, 320 U.S. 277 (1943); *see* Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55 (1933); *cf.* H.M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB. 401, 432 n.70 (1958) (Morissette had no better claim than Dotterweich to a *mens rea* defense, though it should have been allowed to both). It has traditionally been defended as a sine qua non of the *moral* culpability which alone justifies the sanctions imposed by the criminal law. 4 BLACKSTONE, COMMENTARIES, ch. II. It has lately been attacked as outmoded and unscientific in an age of treatment and determinism; *e.g.*, B. WOOTTON, CRIME AND THE CRIMINAL LAW 46-57 *et seq.*, and there is now a debate about the justification of the doctrine. *Compare* J. HALL, GENERAL PRINCIPLES OF THE CRIMINAL LAW 146-70 (2d ed. 1960) (moral guilt at the heart of *mens rea*), *with* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 28-53, 180-85, 206-09 (1968) (utilitarian justification of *mens rea*), *and* Wasserstrom, *H. L. A. Hart and Mens Rea*, 35 U. CHI. L. REV. 92 (1967) (defending Hall against H. L. A. Hart). *See also* Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107 (both justifications advanced). Packer's utilitarian justification is the simple one that men cannot be deterred from doing what they do not know they should not do, but it is open to the criticism that negligence can be deterred and that punishing faultless wrongdoing may reduce the impulse to gamble on fooling a court about one's fault. H.L.A. HART, *supra*, at 18-21 (criticizing Bentham's version of this justification, which in its turn was advanced as a response to Blackstone).

H. L. A. Hart's position is more complicated. It is based on the virtue of a system which lets men order their affairs according to their own plans and permits them to rely on their intentions as rough guides to the conduct for which they will be held accountable. This Comment starts from Justice Jackson's premise that we have accepted the doctrine of *mens rea* and the excuses that go along with it. *Cf.* Packer, *supra*; H.M. Hart, Jr., *supra* (*mens rea* should be prerequisite of criminal responsibility but very often is not).

76. According to Justice Jackson, "The unanimity with which [courts] have adhered to the central thought that wrongdoing must be conscious to be criminal is emphasized by the variety, disparity and confusion of their definitions of the requisite but elusive mental element in crime." Morissette v. United States, 342 U.S. 246, 252 (1952). For accounts of the doctrine in its historical context, see J. HALL, *supra* note 75, at 70-104; Lévitt, *Origin of the Doctrine of Mens Rea*, 117 ILL. L. REV. 117 (1922). *See also* note 78 *infra*.

77. MODEL PENAL CODE §§ 2.01, 2.02, 2.04, Comment (Tent. Draft No. 4, 1955).

78. The traditional dichotomy between "general" and "specific" intent, when it has had any ascertainable content at all, has been used to make two sets of distinctions. First, specific intent may have to be shown "specially," while general intent may be presumed from the performance of an illegal act. This presumption may be rebuttable, thus shifting the burden of proof. *E.g.*, CAL. EVIDENCE CODE § 668 (West 1966); 1 F. WHARTON, CRIMINAL EVIDENCE 243-44 (12th ed. 1955); J. HALL, *supra* note 75, at 144. Or it may be conclusive, thus eliminating the *mens rea* requirement as to some elements of the offense for which it would be required in "specific intent" crimes. *See, e.g.*, D.P.P. v. Smith, 3 All. E.R. 161 (1960); Westbrook, *The Role of Specific Intent in Texas Criminal Law*, 14 BAYLOR L. REV. 32, 35-37 (1962). Holmes's view is similar. *Compare* O.W. HOLMES, THE COMMON LAW 55-57 (1881), *with* Abrams v. United States, 250 U.S. 616, 626-27 (1919) (Holmes, J., dissenting). On the other hand, the distinction may refer to what the Model Penal Code calls "kinds of culpability." *See* note 79 *infra*. Crimes of specific intent may require that the result a law is designed to prevent be *desired* by the actor—that achieving them was the

The Code rejects the traditional distinction between "specific intent" and "general intent" and distinguishes instead four different levels of intent: purpose, knowledge, recklessness, and negligence.[79] Furthermore, *mens rea* is not a unitary concept in any crime; rather, each element of an offense should be examined separately to determine what level of intent the law requires.[80] The Code proposes the general rule that intent will not be "presumed": in every crime, unless the statute plainly provides otherwise, purpose, knowledge or recklessness must be shown with respect to each material element[81]

purpose of his conduct. This is also part of Holmes's view: Abrams v. United States, 250 U.S. 616, 624 (1919) (dissenting opinion); Debs v. United States, 249 U.S. 211 (1919). *See also* MODEL PENAL CODE § 2.02, Comment, at 124-25 (Tent. Draft No. 4, 1955); LA. REV. STAT. ANN. § 14:10 (1951). Or, as in first degree murder, "premeditation" may be required. State v. Anselmo, 46 Utah 137, 148 P. 1071 (1915). *But see* Commonwealth v. Jones, 335 Pa. 522, 525-26, 50 A.2d 317, 319 (1947) (intent to take life is sufficient to establish premeditation). Finally, the two distinctions may both be involved in the concept of "further intention," for which specific intent is sometimes a synonym. "A man gets into a dwelling house at night and the question is not, or not merely, 'Did he do that intentionally?' but 'Did he do that with the further intention, or (as lawyers like to say,) "with the intent" of stealing something?' If so he is guilty of burglary, even if in fact he did not steal anything." H.L.A. HART, *supra* note 75, at 118. Further intent is a requirement of purpose as to a new element of the offense, but the crime is inchoate as to this element.

79. The Code offers the following definitions:

> (2) Kinds of culpability defined.
>
> (a) Purposely.
>
> A person acts purposely with respect to a material element of an offense when:
>
> (i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and
>
> (ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.
>
> (b) Knowingly.
>
> A person acts knowingly with respect to a material element of an offense when:
>
> (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or he knows of the existence of such circumstances; and
>
> (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.
>
> (c) Recklessly.
>
> A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.
>
> (d) Negligently.
>
> A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct, the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

MODEL PENAL CODE § 2.02 (Proposed Official Draft 1962).

80. *Id.* § 2.02, Comment, at 123-24 (Tent. Draft No. 4, 1955).

81. The Code points out the difference between elements of a crime which have to do

of the offense.[82] This is the rule of "full" *mens rea*, and it was adopted by the Supreme Court in *Morissette v. United States*[83] as the normal *mens rea* requirement for federal criminal statutes.[84]

Morissette had removed some spent bomb casings from property owned by the United States Government and had sold them for scrap iron. He was arrested and prosecuted for knowing conversion under the federal theft statute.[85] At trial, Morissette claimed that he had thought the casings were abandoned and that he therefore had a right to take them. He argued that the jury should be instructed to find him not guilty if it believed his professions of good faith. The trial court thought otherwise. "The question of intent," it ruled, is only "whether or not he intended to take the property."[86] Morissette was convicted, but the Supreme Court reversed. The Court held that *mens rea* was required and that this requirement entitled Morissette to go to the jury with his good faith claim. In effect, the Supreme Court found that the material elements of criminal conversion include (1) taking property which (2) one is not entitled to take. The Court required a showing of intent for each element, while the trial court had required it only of the first. And the intent which had to be shown for the second element under the Supreme Court's holding was, as under the Model Penal Code formulation, knowledge or at least recklessness. Morissette had warning that he might have no right to take the casings; until the moment of taking, they did not belong to him, and they were on an Air Force firing range. He might well have been negligent in not inquiring further about the status of the property. But the Supreme Court nevertheless held that because *mens rea* was required the government had to show more than a negligent failure to inquire; the issue was Morissette's actual belief, not what he should have believed or had reason to suspect.[87]

with culpability and those which are essentially jurisdictional. MODEL PENAL CODE § 1.14(10) and Comment, at 118-19 (Tent. Draft No. 4, 1955). A distinction can also be made between ordinary elements relating to culpability and those which create an arbitrary line dividing conduct which is in fact on a continuum of culpability. *Cf.* Regina v. Prince, L.R. 2 Cr. Cas. Res. 154 (1875).

82. MODEL PENAL CODE § 2.02(3) (Proposed Official Draft 1962).

83. 342 U.S. 246 (1952).

84. Except for "public welfare offenses," which the Court said may be "strict liability" offenses. *See* note 75 *supra*. It has been pointed out that the Court could have excused Morissette without bringing the whole *mens rea* doctrine to his defense, since the well-established rule that a claim of right is an excuse to a theft charge would have sufficed. H.M. Hart, Jr., *supra* note 75, at 431 n.70; Packer, *supra* note 75, at 121. The opinion is nevertheless valuable as the hardest look the Court has given to the doctrine.

85. 18 U.S.C. § 641 (1964): "Whoever embezzles, steals, purloins, or knowingly converts" government property is punishable by fine and imprisonment.

86. 342 U.S. at 275-76.

87. *Id.* at 275-76.

The intent required in *Morissette*, and said by the Supreme Court to be applicable to all federal offenses, shows a further aspect of the *mens rea* doctrine which is crucial to the crime of counseling. The defense of a "claim of right" in *Morissette* was of course no innovation but a standard defense to theft at common law.[88] It is one of the limitations on the famous maxim, *ignorantia legis neminem excusat*,[89] since a claim of right may be based on ignorance or mistake of the law of property.[90] The drafters of Model Penal Code put the matter clearly:

> It should be noted that the general principal that ignorance or mistake of law is no excuse is usually greatly overstated; it has no application when the circumstances made material by the definition of the offense include a legal element. So, for example, it is immaterial in theft, when claim of right is adduced in defense, that the claim involves a legal judgment as to the right of property. It is a defense because *knowledge that the property belongs to someone else is a material element of the crime* and such knowledge may involve matter of law as well as fact. But in so far as this point is involved there is no need to state a special principle; the legal element involved is simply an aspect of the attendant circumstances, with respect to which knowledge, recklessness or negligence, as the case may be, is required for culpability . . . . *The law involved is not the law defining the offense; it is some other legal rule that characterizes the attendant circumstances that are material to the offense.*[91]

The distinction between "the law defining the offense" and some other rule that characterizes a material circumstance is a reflection of the distinction orthodox *mens rea* doctrine draws between knowing one is doing an act of a particular description and knowing that in doing such an act one is violating the law. Criminal statutes define conduct and prohibit what they define; the intent required by orthodox *mens rea* doctrine focuses on knowingly doing the conduct

88. Justice Jackson compiled American cases. 342 U.S. at 261 n.19. For the English law, see G. WILLIAMS, *supra* note 14, at 321-27.

89. *See* BLACKSTONE, COMMENTARIES *27. The maxim is elegantly discussed in Keedy, *Ignorance and Mistake in the Criminal Law*, 22 HARV. L. REV. 75 (1908). *See generally* Ryu & Silving, *Error Juris: A Comparative Study*, 24 U. CHI. L. REV. 421 (1957); Hall & Seligman, *Mistake of Law and Mens Rea*, 8 U. CHI. L. REV. 641 (1941).

90. *See* MODEL PENAL CODE § 206.10, Comment (Tent. Draft No. 2, 1954); Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 999 (1932); Hall, *Ignorance & Mistake in Criminal Law*, 33 IND. L.J. 1, 27-29 (1957). Morissette's mistake seems to have been at least in part a mistake of law, but it is unclear whether the trial judge thought that Morissette had been wrong about what the government had to do in order to abandon property (a question of law) or about whether the government had done it (a question of fact).

91. MODEL PENAL CODE § 2.02, Comment 131 (Tent. Draft No. 4, 1955) (emphasis added).

described by law, not on knowing that it is so described or that it is prohibited.[92] Of course, "conduct" in this sense is more than muscular contractions;[93] someone who is mistaken about the "material" circumstances in which he acts has not "intentionally" done what the law describes.[94] With this caveat, orthodox *mens rea* doctrine excuses ignorance or mistake about the nature of the conduct engaged in, but not about whether it was prohibited.[95]

The consistent presence of a full *mens rea* requirement in the history of counseling crimes and the inclusion of the word "knowingly" in the federal statute defining the draft counseling offenses require at least that, as in *Morissette*, normal *mens rea* in the Model Penal Code's sense be required—purpose, knowledge, or recklessness as to each material element.

B. *Counseling Refusal to Submit to Induction*

The Supreme Court's analysis in the *Morissette* case suggests that proper classification of the registrant counseled must be considered,

92. *See, e.g.*, H.L.A. HART, *supra* note 75, at 36; Ellis v. United States, 206 U.S. 246, 257 (1907): "If a man intentionally adopts certain conduct in certain circumstances known to him; and that conduct is forbidden by the law under those circumstances, he intentionally breaks the law in the only sense in which the law ever considers intent." *But see* pp. 1030-32 *infra*.

93. The law does not prohibit moving one's finger, or pulling a trigger, or firing a gun, or aiming it before firing, but it has forbidden the conjunction of all these things when it is a person who is being aimed at. The criminal "act" is therefore not moving, pulling a trigger, etc., but doing what the law forbids in the circumstances in which it is forbidden. On the related hazard of seeking to define when "an act" begins and ends without the benefit of a statutory definition of the act, see Comment, *Twice in Jeopardy*, 75 YALE L.J. 262, 275-76 (1965) (citing J.L. Austin).

94. *See, e.g.*, Packer, *supra* note 75, at 141-42. Hall & Seligman, *Mistake of Law and Mens Rea*, 8 U. CHI. L. REV. 641, 665-66 (1941), point to recognition and denial of the good faith belief defense by different courts and conclude that the "defendant's knowledge that his actions are in violation of the express provisions of a statute would seem in many cases to show a sufficiently corrupt intent to warrant conviction even for a crime requiring a specific intent to act fraudulently or illegally." 8 U. CHI. L. REV. at 666 n.107. But the Model Penal Code's suggestion is preferable: "When knowledge of a particular fact is an element of an offense, such knowledge is established if a person is aware of a substantial probability of its existence, *unless he actually believes that it does not exist.*" MODEL PENAL CODE § 2.02(7) (Proposed Official Draft 1962) (emphasis added).

95. The law of property places goods in different statuses and describes rights between private parties to these goods; the law of theft penalizes taking goods which are in given statuses. The distinction between "law defining the offense" and "legal elements of a material circumstance" is thus a distinction between the criminal law—whose obligations one must obey and ignorance of which will not excuse—and the civil law material to it —ignorance of which is ignorance of a material circumstance connected with a particular action and thus implies a lack of "intent" to do the act described and forbidden by criminal law. This distinction, with minor variations, is drawn by the commentators who have attempted to go beyond the mystique of "specific" and "corrupt" intent. The most exhaustive treatment is G. WILLIAMS, *supra* note 14, at 304-45. Hall, *Ignorance & Mistake in the Criminal Law*, 33 IND. L.J. 1, 27-29 (1957), and Keedy, *Ignorance & Mistake in the Criminal Law*, 22 HARV. L. REV. 75, 90-96 (1908), are in substantial accord, though Keedy's terminology is odd and Hall favors an exception for those parts of civil law, like tort law, which "reflect simple moral values."

like ownership in theft prosecutions, as a material element of the crime of draft counseling. Therefore, a good faith mistake about the propriety of the classification must be a good defense to a charge of counseling refusal to submit to induction.

It is not always a crime to refuse to submit to induction, despite the wording of the law. Proper classification[96] and procedure[97] by the Selective Service System are prerequisites to a lawful order to submit.[98] And counseling disobedience to an unlawful order is no crime at all.[99] Proper classification and procedure should therefore be considered elements of the offense of draft counseling. For the rules concerning classification and procedure do not define the duty to submit to induction; they are civil determinations which the Act instructs the Selective Service System to make. Mistaken belief that a registrant has been wrongly classified or processed—or that the classification procedures violate the equal protection or due process clauses—is a mistaken apprehension about the circumstances in which the registrant refuses to submit. Such a mistake relates to the details of an administrative statute which is as collateral to the primary duty to submit to induction as the law of property was to the law of theft in *Morissette*.

Proper classification and procedure should be considered "*material* elements," in the language of the Model Penal Code, since they relate to "the harm or evil, incident to conduct, sought to be prevented by the law defining the offense."[100] The allowance of the defenses of improper classification and procedure establishes that the evil to be

96. Classification may be improper because the wrong legal standard was used by a draft board. Sicurella v. United States, 348 U.S. 385 (1955); United States v. Carroll, 398 F.2d 651 (3d Cir. 1968), or because the board's classification was simply so erroneous as to have "no basis in fact." Estep v. United States, 327 U.S. 114 (1946); Dickinson v. United States, 346 U.S. 389 (1953).

97. Improper Selective Service procedure voids an induction order. *See* Simmons v. United States, 348 U.S. 397 (1955); Boswell v. United States, 390 F.2d 181 (9th Cir. 1968); United States v. Walsh, 279 F. Supp. 115 (D. Mass. 1968). There is a "presumption of regularity" which cloaks Selective Service procedure, but the presumption is rebuttable. *E.g.*, United States v. Bellmer, 404 F.2d 132 (3d Cir. 1968); *see* United States v. Lybrand, 279 F. Supp. 74 (E.D.N.Y. 1967) (procedural regularity a material element of offense of refusal to submit to induction and must if the issue is raised be proven beyond a reasonable doubt as any other element). *See generally* 1 SEL. SERV. L. REP. 1147-48 (1968), and sources cited therein.

98. Notes 108 and 109 *supra*. The addition of "refuse" to the prohibition of "evasion" in 1948 makes it necessary to read the statute as reaching only those who *unlawfully* "refuse registration or service," because refusal of service is legal when the order to serve is not.

99. Since a registrant has not violated the law when he "refuses or evades registration or service" after receiving an unlawful order, the same qualification must be read into the crime of *counseling* another "to refuse or evade registration or service." The alternative is to take the extraordinary step of asserting that counseling of *legal* behavior is a crime, going in the face of the common law history of the crime of counseling with no justification whatsoever in the legislative history of the provision. In any event, the first amendment alone would seem clearly to preclude such a reading of the law.

100. MODEL PENAL CODE § 1.13(10) (Proposed Official Draft 1962).

prevented by the statute was the refusal to submit to orders lawful in this respect.[101]

The *Morissette* analysis suggests that a *registrant* who makes a good faith mistake about the propriety of the classification underlying his order to submit to induction could not be convicted of intentionally disobeying that order. No case has allowed this good faith belief defense, however,[102] and it is possible to argue that such a defense would defeat the manifest policy of the Act. The Supreme Court has upheld Congress's determination—embodied in Section 10(b) (3)[103]—that for an army to be raised efficiently, registrants must be processed without the delay caused by litigation.[104] Allowing registrants a defense of good faith mistake about the validity of their classification would permit them to refuse induction and litigate the classification issue with little risk if they could prove that they believed that they should not have been called—effectively defeating the policy of speedy processing.

Whatever the force of this justification for a serious inroad on a fundamental principle of criminal law in the case of a registrant, there

101. Estep v. United States, 327 U.S. 114 (1946), the case which allowed judicial review of a refusal to submit to induction, was premised on the Board's lack of jurisdiction to issue an unlawful order, but this fact should not be thought to remove improper classification from the status of a "material element." Nonmaterial elements are those which "relate exclusively to the statute of limitations, jurisdiction, venue or to any other matter similarly unconnected with (i) the harm or evil, incident to conduct, sought to be prevented by the law defining the offense, or (ii) the existence of a justification or excuse for such conduct." MODEL PENAL CODE § 1.13(10) (Proposed Official Draft 1962). After *Estep* established the defense of unlawfulness of the order, it is clear that it is only the *court's* jurisdiction over the person and over the subject matter, not the local board's jurisdiction, which would come under the definition of nonmaterial elements.

102. The only reported case which explicitly deals with *mens rea* in refusal to submit to induction is ambiguous:

> If the Government proves defendant intentionally refused to comply with an order of his draft board, in accordance with the statute, to submit to induction, it is not open to defendant to offer as an excuse that he regarded the war as illegal. . . . [I]n a prosecution for wilfully refusing to obey an induction order, evidence with respect to belief is admissible only to the extent it bears upon the issue of intent, as distinguished from motive or good faith.

United States v. Sisson, 294 F. Supp. 515, 519 (1968). In virtually every contested prosecution, however, the defendant contends at trial that he should not have been ordered to submit. Courts have not suggested that defendants could otherwise be acquitted; honest belief has not been thought reason enough to excuse. *But cf.* cases cited note 115 *infra*.

103. *See* note 10 *supra*.

104. The circumstances under which the Act was adopted lend no support to a view which would allow litigious interruption of the process of selection which Congress created. To meet the need which it felt for mobilizing national manpower in the shortest practicable period, Congress established a machinery which it deemed efficient for inducting great numbers of men into the armed forces. Careful provision was made for fair administration of the Act's policies within the framework of the selective service process. But Congress apparently regarded "a prompt and unhesitating obedience to orders" issued in that process "indispensable to the complete attainment of the object" of national defense.

Falbo v. United States, 320 U.S. 549, 554 (1944). *But see* Oestereich v. Local Bd. No. 11,393 U.S. 233 (1968) (Section 10(b)(3) not applicable to certain statutory exemptions).

is no adequate justification for abandoning the normal *mens rea* requirement for draft counselors. Section 10(b)(3) is a specifically enacted exception to ordinary procedure applicable by its own terms only to registrants. Moreover, the counselor is being neither classified nor drafted, and is at best a very indirect object of the goal of speedy processing.

The *mens rea* analysis presented here does not by itself yield a full-fledged good faith belief defense to the crime of counseling refusal to submit to induction. An objection to the basic duty to register and serve—on the grounds that the peacetime draft is unconstitutional,[105] for example—does not reach any matter that can be classified as collateral civil law made material to the offense.[106] Subsequent sections of this Comment, however, will show that the good faith defense must reach any honest belief in the ultimate legality of the conduct counseled.

C. *Counseling Violation of Other Duties*

The order to submit to induction is only the last of many demands which the Selective Service System makes of a registrant. If a counselor advocates violation of the possession requirement,[107] for example, and his advice is taken, the draft registrant may be prosecuted for violation of the requirement or classified I-A as a delinquent and ordered to report for induction.[108] If the counselor advises refusal of an accelerated order to submit to induction because he believes that the registrant has violated no legal duty by failing to possess a draft card, the *Morissette* analysis requires that he should have the defense of a good faith belief. Accelerated induction is unlawful where the registrant is

105. *Cf.* Selective Draft Law Cases, 245 U.S. 366 (1918).

106. To give a further example, an argument that the war in Vietnam, and hence conscription for it, is illegal does not put the classificatory process in issue as does the argument that nonreligious conscientious objectors are entitled to I-O status if religious CO's are so classified.

107. The counselor might think the possession requirement invalid because (1) it is an abridgment of the registrant's freedom of speech and right to privacy which is not outweighed by any legitimate governmental interest; or (2) it restricts the registrant's exercise of symbolic speech, such as participating in a ceremony in which a number of registrants return their draft cards to their local boards, *cf.* Oestereich v. Local Bd. No. 11, 393 U.S. 233 (1968); or (3) it is not, in fact, a criminally-punishable duty under 32 C.F.R. § 1617.1 (1969). *See* Dranitzke, *Possession of Registration Certificates and Notices of Classification by Selective Service Registrants*, 1 SEL. SERV. L. REP. 4029 (1968).

108. Anyone who "fails or neglects to perform any duty required of him under the provisions of the selective service law" is a delinquent, 32 C.F.R. § 1602.4 (1969), and the local board may declare him to be one. *Id.* § 1642.4(a). "Any delinquent registrant . . . may be classified in or reclassified into Class I-A, Class I-A-O, or Class I-O, whichever is applicable, regardless of other circumstances . . .", *id.* § 1642.12, and "[T]he local board shall order each delinquent registrant . . . to report for induction . . . or . . . shall order him to perform . . . civilian work in lieu of induction . . . ." *Id.* § 1642.13.

guilty of no unlawful conduct; like proper classification, therefore, the legality of the conduct leading up to the accelerated order must be considered a material element of the crime of draft counseling.

The *Morissette* analysis does not, however, yield the good faith defense when the charge is counseling violation of the possession duty itself, rather than the refusal to submit to an accelerated induction. The regulation alone establishes the possession requirement; there is, again, nothing that can be analogized to collateral civil law. Different principles concerning the *mens rea* requirement, however, resting upon the nature of the Selective Service law, justify granting the good faith defense to counselors who advocate violation of duties prior to the order to submit to induction.

The duties imposed on draft registrants are numerous and complex; their main function is promotion of administrative convenience and only very indirectly prevention of harm to society.[109] They are, in traditional terminology, *mala prohibita.* The case for the *ignorantia legis* rule is weakest for such crimes because there is no basis for saying a defendant voluntarily caused harm unless he knew he was violating the law. As Henry Hart has pointed out,

> If . . . the criminal law adheres to this maxim [*ignorantia legis*] when it moves from the condemnation of those things which are *mala in se* to the condemnation of those things which are merely *mala prohibita,* it necessarily shifts its ground from a demand that every responsible member of the community understand and respect the community's moral values to a demand that everyone know *and understand* what is written in the statue books.[110]

109. *See, e.g.,* 50 App. U.S.C. § 453 (Supp. III, 1968), 32 C.F.R. § 1611.1 (1969) (duty to register at 18); 32 C.F.R. § 1611.7(a) (duty to familiarize oneself with duties under regulations); *id.* § 1617.1 (duty to have unaltered registration certificate in personal possession); *id.* § 1625.1(b) (duty of registrant and others who file a request for registrant's deferment to inform board of "any fact that might result in the registrant being placed in a different classification"); *id.* § 1632.14 (duty to report for and submit to induction); *id.* § 1641.7 (duty to report current status and physical condition to board); *id.* § 1660.30 (duty to obey order to perform civilian work). Employees of the system may also become felons without much effort. *E.g.,* 32 C.F.R. § 1641.7 (1969) (duty to conduct themselves in such a manner that the work of the System is effectively accomplished; to be courteous, considerate, and prompt; not to bring discredit or embarrassment to the System). Although it is difficult to believe that such administrative directives were intended to be criminally enforced, deviation from them appears to be punishable under Section 12(a) of the Act, which provides: "Any member of the Selective Service System or any other person charged as herein with the duty of carrying out any of the provisions of this title, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty . . ." is guilty of a felony. 50 App. U.S.C. § 462(a) (Supp. III, 1968).

The consequence of the draft regulations being a complex, voluminous, and often vague set of requirements enforced through a catch-all phrase in the statute has been suggested in cases such as Boyce Motor Lines, Inc. v. United States, 342 U.S. 337 (1952), discussed in note 122 *infra.*

110. H.M. Hart, Jr., *supra* note 75, at 419 (emphasis added).

The Supreme Court has recognized a defense of a good faith mistake of law under the tax code. In *United States v. Murdock*[111] it interpreted a statutory "willfulness" standard to excuse a violation of the tax code's reporting duty which Murdock thought was justified by the privilege against self-incrimination.[112] The Court held that the willfulness standard, in the context of an extraordinarily complex statute, required that a criminal act or omission be committed "without ground for believing it is lawful" or with "careless disregard whether or not one has the right so to act."[113] The administrative, quasi-criminal nature of the duties under the draft law, like those imposed by the tax code, justify holding that violations are not felonious where the violator thought he was within his legal rights.[114]

The ideas of culpability and voluntariness underlying the *mens rea* doctrine might, therefore, reasonably be read to excuse *registrants* who, like Murdock, believe that they are not required by valid law to perform any given conduct. And, in fact, the cases discussing a registrant's intent in prosecutions for violations of obligations have said that willful violation of law is required and granted a limited defense of mistake about obligations under the law.[115] While the same

111. 290 U.S. 389 (1933).

112. Murdock had lost on this issue in United States v. Murdock, 284 U.S. 141 (1931). It was on remand of this case that Murdock unsuccessfully attempted to have his good faith belief in the legality of his conduct put before the jury. The holding of the first *Murdock* case, that the privilege against self-incrimination does not apply in federal hearings to state criminal jeopardy, was overruled by Murphy v. Waterfront Commission, 378 U.S. 52 (1964).

113. 290 U.S. at 394-95. The Court continued:

> Congress did not intend that a person, by reason of a bona fide misunderstanding as to his liability for the tax, as to his duty to make a return, or as to the adequacy of the records he maintained, should become a criminal by his mere failure to measure up to the prescribed standard of conduct. And the requirement that the omission in these instances must be willful, to be criminal, is persuasive that the same element is essential to the offense of failing to supply information.

Id. at 396.

114. And since most violations of the draft law, like Murdock's violation of the tax code, are by omission rather than commission, there is even less basis for saying that the offender has consciously done something evil or actively put himself outside the law than there would be if his positive conduct had been forbidden by law. *See* Hughes, *Criminal Omissions*, 67 YALE L.J. 590, 600-14 (1958); Lambert v. California, 355 U.S. 225 (1957). It is possible that *Lambert* leads to a defense of non-negligent ignorance of the law where omission to perform a statutory duty is only *mala prohibita*.

115. *E.g.*, United States v. Rabb, 394 F.2d 230 (3d Cir. 1968) (refusal to report for induction must be "willful," and willfullness is a state of mind in which a defendant is fully aware of his obligations to comply with the order to report for induction; conviction reversed because defendant's testimony indicated he did not report only because he was reasonably awaiting a ruling on a claim for deferment he had recently submitted). *Accord*, Silverman v. United States, 220 F.2d 36, 39-40 (8th Cir. 1955) (intent to evade, not mere knowing failure to report, is necessary to convict for failure to report for induction; conviction affirmed); United States v. Hoffman, 137 F.2d 416 (2d Cir. 1943) (same; conviction reversed).

To interject a note of realism, one need only compare the Government's position toward a registrant who refuses induction with that towards one who disobeys another

considerations of speedy processing which alone could justify restricting the *mens rea* defense in prosecutions for refusal to submit to induction may be applicable when other duties are involved, and hence might restrict the scope of the "willfulness" standard applied to registrants who violate the law, draft counselors, again, should be entitled to the full reach of the defense. The statutory requirement of "knowing" counsel of illegal conduct would therefore be read to reach as far as the "willfulness" standard in *Murdock*:[116] to excuse counsel of all conduct or omissions which the counselor did not know violated any valid law. Such a defense, while going beyond a normal *mens rea* requirement, would respond to the concern of the *mens rea* doctrine that only the voluntary commission of harm be punished.

IV. Vagueness

Much of the Selective Service Act is vulnerable to challenges on the grounds of vagueness. The web of duties imposed by the Act and regulations is defined with remarkable informality and imprecision.[117] The possession requirement, for example, cannot be complied with if read literally,[118] and other requirements are so broad as to be little

draft obligation, when both assert the good faith defense, to realize the far more pressing need for the defense to be allowed in the latter case if substantial constitutional issues are not to be raised. In the case of registrants whose refusals of induction orders are based on an erroneous (albeit honestly believed) reading of the draft law, the prosecution is often willing to allow the registrant to agree to join the armed services once it becomes apparent his case has been lost. But what of the eighteen-year-old who refuses to report his "current status" to his local board? If he is proven wrong on the law, he will not find (nor would the Government attorney probably offer) induction as an alternative to conviction for the draft offense. Yet if his belief is bona fide, and his normal date of induction far in the future, denying him the good faith belief defense cannot be justified on the basis that his refusal of this regulatory duty interfered with his "speedy processing" into the armed forces.

116. The Selective Service System itself has lent some support to this reading of the Act by its interpretation of the legislative history. See p. 1016 *supra*. Indeed, it is difficult to attach any other meaning to the specific addition of a "knowingly" requirement to the offense of draft counseling, since counseling is always intentional conduct.

117. Duties defined in Section 12(b) are relatively precise. In Section 12(a), the prohibition on "hindering or interfering in any way . . . with the administration of this Act," is evidently boundless. It might reach the registrant who is late for an appointment or the local board member who resigns because of ill-health or opposition to United States foreign policy. The 1940 Act limited the provision to knowingly "hindering and interfering by force or violence." The Fifth Circuit read this limitation strictly to bar conviction of a registrant who had torn up his Classification Questionnaire and muttered drunkenly about his draft board. Bagley v. United States, 136 F.2d 567 (5th Cir. 1943). Congress replied to this attempt at limitation by adding "or otherwise" after "by force or violence" in 1948. The requirement of a purpose to hinder or interfere has been suggested. Chambers v. United States, 391 F.2d 455 (5th Cir. 1968). But this leaves the provision reaching acts of protest and pique. Most of the duties reached by Section 12(a) are in the Regulations, which are complex, vague, and profuse. *See* note 109 *supra*.

118. 32 C.F.R. §§ 1617.1, 1623.5 (1967). To quote § 1617.1:

Effect of failure to have unaltered registration certificate in personal possession.—

more than general admonitions.[119] Absent a strict intent rule, counselors and registrants would have to rely on the generosity or selectivity of prosecutors to excuse technical violations of the law even when innocent and harmless. A good faith belief defense speaks to the problems posed by the uncertainty of the Act.

Courts faced with prosecutions under the draft law have a difficult job of interpretation to give meaning to its provisions. If the Act and regulations often cannot mean what they say, it is by no means certain what they do mean. The Supreme Court's reliance on intent requirements in interpreting vague statutes[120]—particularly when they are federal[121]—is addressed to the dilemma of those who, like the draft counselor, cannot reasonably be required to know the scope of a statutory duty at their peril. The solution the intent requirement reaches when it is properly used incorporates part of the good faith belief defense: a defendant to be convicted under a vague statute must know or believe that his conduct was of the sort comprehended by its terms. [122]

> Every person required to present himself for and submit to registration must, after he is registered, have in his personal possession at all times his Registration Certificate. . . . The failure of any person to have his Registration Certificate (SSS Form 2) in his personal possession shall be prima facie evidence of his failure to register.

See 1 SEL. SERV. L. REP. 1184 (1968). It has been seriously argued that possession of a card should not be included in the "requirements" reached by Section 12(a). Dranitzke, *Possession of Registration Certificates and Notices of Classification by Selective Service Registrants*, 1 SEL. SERV. L. REP. 4029 (1968). Most of the vague requirements, however, are worded to leave no doubt that they are the sort of duty reached by Section 12(a). *See, e.g.*, note 119 *infra*.

119. *E.g.*, "It shall be the duty of every classified registrant to keep his local board currently informed . . . of his physical condition. . . . Every classified registrant shall, within 10 days after it occurs, report to his local board in writing every change . . . in his physical condition . . . ." 32 C.F.R. § 1641.7 (1969). Informality particularly pervades the regulations prescribing duties for the administrators of Selective Service, and these regulations too are part of the "requirements" reached by the counseling provision.

120. The first case is Omaechevarria v. Idaho, 246 U.S. 343 (1918). There were soon quite a few cases upholding vague statutes. Boyce Motor Lines, Inc. v. United States, 342 U.S. 337 (1952); Dennis v. United States, 341 U.S. 494 (1951); American Communications Ass'n v. Douds, 339 U.S. 382 (1950); Screws v. United States, 325 U.S. 91 (1945); United States v. Ragen, 314 U.S. 513 (1942); Gorin v. United States, 312 U.S. 19 (1941); Hygrade Provision Co. v. Sherman, 266 U.S. 497 (1925); *cf.* Scales v. United States, 367 U.S. 203 (1961).

121. Only the two earliest cases, *Omaechevarria* and *Hygrade Provision Co., supra*, were state cases. The Supreme Court's preference for construing federal statutes narrowly rather than striking them down is discussed in Note, *The Void-For-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 86, 101 n.184 (1960).

122. Thus in Boyce Motor Lines, Inc. v. United States, 342 U.S. 337 (1952), the Court found the vagueness of a regulation cured by a requirement of "knowing" violation. The regulation required trucks to avoid certain routes "so far as practicable, and where feasible"—a standard challenged as vague. The kind of mistake which would ordinarily excuse would be a mistake about what hazards were on the route taken or that another route was available. The mistake which the Court suggests would excuse a violation would be an incorrect interpretation of the vague standard: the defendant takes route *A* thinking it the "safest practicable" as required by law; the jury, or judge, knowing just

The critics of reliance on intent requirements to cure vague statutes have made the device seem more dramatic and less useful than it actually is. An intent requirement does not make or attempt to make a statute any less vague.[123] Nor does it "amount to asserting that the black heart of the defendant enables him to know what . . . judges are not able to define."[124] Instead, the defendant's belief that he is within the terms of a statutory prohibition may substitute for the reasonable notice most criminal statutes are thought to give. The justification is obvious: vague standards more easily than precise ones can trap defendants into unwitting violation of law. Requiring knowl-

the same facts, applies a different standard and finds route *B* the "safest practicable"; the Court suggests that the defendant would be excused.

Justice Frankfurter explains Justice Brandeis's opinion in *Omaechevarria* in similar terms. The statute there codified the practice that sheepherders should not let sheep graze on any "range usually occupied by any cattle grower." Defendants were protected against the vagueness of this phrase by an intent requirement which meant, said Justice Frankfurter, that "under the Act a man would have to know that he was grazing sheep where he had no business to graze them." Screws v. United States, 325 U.S. 91, 156 (1945) (dissenting opinion). The intent standard suggested is the same as that in *Boyce:* a man does not know he is grazing sheep where he should not unless his interpretation of "range usually occupied by any cattle grower" is the same as what the statute is officially construed to mean. This standard is precisely what Justice Holmes found to be *beyond* the limits of ordinary *mens rea* requirements in Ellis v. United States, 206 U.S. 246, 257 (1907).

Sheriff Screws was convicted of "willfully" depriving a prisoner of "rights, privileges, and immunities guaranteed by the Fourteenth Amendment" by beating him to death. Justice Douglas's prevailing opinion purported to avoid the problem of the uncertain standard by reading the "willfulness" requirement as "connoting a purpose to deprive a person of a specific constitutional right." 325 U.S. at 101. The value of the standard is not that it requires "purposeful" conduct: the willfulness standard must refer to and punish only deprivations of rights *known* to the defendant. Vagueness is overcome because "One who does act with such specific intent is aware that what he does is precisely that which the statute forbids. He is under no necessity of guessing whether the statute applied to him . . . for he either knows or acts in reckless disregard of its prohibition of the deprivation of a defined constitutional or other federal right. . . . The Act would not then become a trap for law enforcement agencies acting in good faith." 325 U.S. at 104.

Watkins v. United States, 354 U.S. 178 (1957), resolves the same problems in a slightly different way. Watkins was prosecuted for failing to answer a question posed him by a congressional committee. He was obligated to answer only "pertinent questions" but a mistake about pertinence was precluded from serving as an excuse by a previous decision. Therefore, said the Court, Congress must substitute a clear and easily knowable explanation of "pertinence" to relieve the dilemma of a witness with a right to silence under certain circumstances who does not know if he is in those circumstances.

123. Only constriction of the range of conduct prohibited by the statute can do that. *See, e.g.,* United States v. Harriss, 347 U.S. 612 (1954); United States v. CIO, 335 U.S. 106 (1948).

124. Screws v. United States, 325 U.S. 91, 151 (1945) (dissenting opinion). The Court has on occasion moved beyond an actual belief standard in cases where a party's "knowing" that he was within the terms of the statute was unlikely or perhaps in some sense impossible. Thus the *Screws* majority chose a double test: the right involved had to be "definite" enough to be knowable, and the defendant had to know it. In Williams v. United States, 341 U.S. 97 (1951), the Court found a defendant convictable under the *Screws* statute because he had been found to have the requisite specific intent *and* because it was as "plain as a pikestaff" that his conduct had deprived a prisoner of due process. 341 U.S. at 101. In James v. United States, 366 U.S. 213 (1961), "willful" violation of a tax law (under the *Murdock* rule requiring knowledge of unlawfulness as a necessary ingredient of 'willfulness') was held to be impossible when the Court found the conduct involved to be illegal only by overruling an earlier case.

edge of violation of the law avoids the potential for unfair surprise by holding a defendant only to what he actually believes.[125]

Such an intent requirement could be used to protect defendants under the Selective Service Act. The vague terms of the Act and Regulations must contain an implied "reasonableness" modifier. To be convicted a defendant would have to know not merely that given conduct was literally encompassed by the words of a vague requirement but that he had "violated" it in the stronger sense that it was meant to apply to the conduct involved in his case. So framed, the intent device can be used in the draft law to excuse mistakes of law which are—as a matter of constitutional law—reasonable.

This element of a good faith defense quite reasonably might apply to registrants as well as counselors, though the same policies that limit the ordinary *mens rea* defense also apply here.[126] To whomever the defense applies, in one sense it goes beyond ordinary *mens rea* because mistakes about material criminal—as well as civil—law will excuse under it. But in another sense it does not reach so far as the ordinary *mens rea* standard. Since the excuse is based on the vague wording of a statute, objections to the statute's constitutionality in general do not seem relevant. Constitutional theories and beliefs would be relevant only to the extent that they influence someone's interpretation of the meaning of a statute; registrants and counselors, like judges,[127] may determine the meaning of words by looking at their context.

While this sort of strict intent requirement can cure a vague statute

125. Opinions have stressed the surprise element even where they have not succeeded in preventing it. Some relative successes are cited in note 122 *supra*. The failures are cases where a bad purpose is thought to alleviate vagueness problms. Thus in Dennis v. United States, 341 U.S. 494, 515 (1951), the Court found petitioner's argument—that the statute which proscribed advocacy of overthrowing the United States government by force was too vague—"particularly nonpersuasive when presented by petitioners, who, the jury found, intended to overthrow the Government as speedily as circumstances would permit. . . . A claim of guilelessness ill becomes those with evil intent." Since the defendants were found to be within the terms of the statute, the Court seems to be saying, they could not have been misled by it. Similarly, in Gorin v. United States, 312 U.S. 19 (1941), the Court was untroubled by the unfairness inherent in the expansive reading it gave to the phrase "place connected with the national defense" in the Espionage Act of 1917, 40 Stat. 217, because of "the obvious delimiting words in the statute . . . requiring 'intent or reason to believe that the information to be obtained is to be used to the injury of the United States, or to the advantage of any foreign nation.' This requires those prosecuted to have acted in bad faith. The sanctions apply only when *scienter* is established." 312 U.S. at 27-28. But the bad purpose supplies no *scienter* because other nations may be aided by all sorts of information and Gorin was prosecuted for giving a specific kind.

126. *See* p. 1029 *supra*.

127. *E.g.*, United States v. Harriss, 347 U.S. 612 (1954); United States v. CIO, 335 U.S. 106 (1948); Dennis v. United States, 341 U.S. 494, 501 (1951); American Communications Ass'n v. Douds, 339 U.S. 382, 407 (1950).

like the draft law of its potential for unfair surprise, it does not really respond to an important function of the void-for-vagueness doctrine: the protection of substantive constitutional rights.[128] The Supreme Court's treatment of *mens rea* requirements in free speech cases, however, suggests that adequate protection of the first amendment rights of draft counselors requires a full-fledged good faith belief defense.

V. Free Speech

In protecting free expression, the Supreme Court has consistently given substantial weight to the danger that even justified speech regulation may deter speech which the regulation does not—or cannot—prohibit.[129] Prudent men allow a margin, which the law usually encourages,[130] between their actions and prohibited conduct. All laws therefore deter more conduct than they forbid.[131] In laws regulating speech, this "chilling effect" is pernicious because of the need to protect free expression. The first amendment issue raised by draft counseling is particularly acute because of the vagueness of the Selective Service Act.[132]

Draft counselors can marshal broad first amendment arguments that no counseling can be prohibited.[133] Even if some counseling may be prohibited, counselors are entitled to incite *legal* conduct;[134] but

128. The intent requirement has been used primarily in cases where the speech interest is not as central to the vagueness element as vague warning and the possibility of a booby trap. Unhappy exceptions are Dennis v. United States, 341 U.S. 494 (1951), and American Communications Ass'n v. Douds, 339 U.S. 382 (1950).

129. *E.g.*, Baggett v. Bullitt, 377 U.S. 360 (1964); Smith v. California, 361 U.S. 147 (1959); Speiser v. Randall, 357 U.S. 513 (1958).

130. "Nor is it unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line." Boyce Motor Lines, Inc. v. United States, 342 U.S. 337, 340 (1952); Nash v. United States, 229 U.S. 373, 377 (1913).

131. *See* A. BICKEL, THE LEAST DANGEROUS BRANCH 149 (1963).

132. "The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of first amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application." NAACP v. Button, 371 U.S. 415, 432-33 (1963), *citing* Note, *supra* note 121, 67 U. PA. L. REV. at 75-76, 80-81, 96-104; *see* cases cited note 129 *supra*.

133. They may argue the "absolute" view that counseling is speech and therefore not prohibitable. *Cf.* Emerson, *Freedom of Expression in Wartime*, 116 U. PA. L. REV. 975, 989-96 (1969) (all speech should be protected except some "advice or instruction in various illegal methods of evading the draft . . . ."). Or they may argue that their counsel is "discussion," not "incitement," or that it does not present a danger to national security sufficient to outweigh its value to public discussion. *Cf.* Bond v. Floyd, 385 U.S. 116 (1966); Yates v. United States, 354 U.S. 298 (1951); Whitney v. California, 274 U.S. 357 (1927) (concurring opinion). Such an argument is strong in the *Spock* case, even though it was rejected by the First Circuit, where speech was uninflammatory and addressed itself to important public issues.

134. *See* note 99 *supra*.

the counseling provision threatens to deter much of this protected speech because counselors who are uncertain what a court will think of their legal beliefs may prefer silence to the risk of prosecution. The resulting danger to free expression is greater under the draft law than in other areas. For example, much of the speech deterred by obscenity laws is almost obscene—tawdry if not illegal.[135] Laws prohibiting incitement of violence also deter speech which resembles but does not quite amount to "fighting words."[136] Some of this speech will be valuable, but if the original prohibition is justified the speech deterred will tend to be almost bad enough to punish. The line between counsel of legal and illegal conduct under the draft law, by contrast, is not located on a continuum of speech that can be specified independently of the law itself.[137] The speech deterred by self-censorship of counselors will be that which is *most* valuable—debate and counsel about provisions of an important and controversial law, whose proper interpretation is a grave but unresolved question and which may well be invalid.

To prevent a "chilling effect," a court can simply strike down the statute that causes it.[138] But this action may protect speech or association which a legislature wanted to prohibit and by hypothesis is empowered to prohibit.[139] In at least two areas the Supreme Court has moved toward the compromise of the good faith belief defense. In *New York Times v. Sullivan*,[140] the Court held that in libel actions by public officials "actual malice" on the part of the defendant must be proved before damages can be awarded: the defendant must know

135. The definition of "obscenity" requires that the material be "utterly without redeeming social importance." Memoirs v. Massachusetts, 383 U.S. 413, 419 (1966). On the hazards and inconsistencies of the search for "social value," see Note, *More Ado About Dirty Books*, 75 YALE L.J. 1364 (1966).

136. *Compare* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), *with* Terminiello v. Chicago, 337 U.S. 1 (1949).

137. The necessity for obeying the draft law is not that it codifies an obligation already part of community mores; it cannot presently be said that it is immoral not to join the army if one is not obligated to by law. With the absence of legal obligation, therefore, the evil of failing to join the army disappears. The law, in short, is *malum prohibitum*. A qualification is necessary: conduct which is not "evasion" within the meaning of the Act may nevertheless be very close to it—the term is one of degree.

138. *E.g.*, Baggett v. Bullitt, 377 U.S. 360 (1964); *cf.* Dombrowski v. Pfister, 380 U.S. 479 (1965).

139. Striking down a statute because of the effect it may have on speech it does not actually prohibit—instead of limiting its scope with an intent requirement—may indicate the Court's very low estimate of the state's interest in preventing what, theoretically, it is entitled to prohibit or a fear that even with an intent requirement the deterrent effect will be unusually large. Both these factors were present in *Baggett*, a loyalty oath case. The Court is unimpressed by the merits of oaths, and oaths may deter more than criminal laws because they are self-executing.

140. 376 U.S. 254 (1964).

that his assertions are false or recklessly disregard whether they are true or false.[141] Justice Brennan, writing for six members of a unanimous Court, declared that a straight-forward defense of truth was not sufficient to protect free expression, since it would still encourage self-censorship: "Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred."[142] To avoid this chilling effect, the Court "over-protected" speech:[143] the first amendment requires that good faith belief in the truth of a defamatory statement be a complete defense in a libel action.[144]

The Court seems to be tending in a similar direction in obscenity cases. In *Smith v. California*[145] it held that a state could not impose criminal liability on the seller of an obscene book without showing that he had some knowledge of the contents of the book. Justice Brennan's opinion leans heavily on the chilling effect of "strict" liability, arguing that booksellers subject to such liability would restrict the books they sold and "free expression would be the loser."[146] The Court specifically declined to indicate the precise nature of the necessary mental element though it listed the good faith belief defense as one possibility: "honest mistake as to whether [a book's] contents in fact constituted obscenity."[147]

141. This, it will be recalled, is the intent standard proposed by the Model Penal Code applied to the element of the falsity of the speech.

142. 376 U.S. at 279.

143. "In order," as Harry Kalven, Jr., puts it, "to assure that it is not underprotected." *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 213.

144. The actual malice standard of *New York Times* is what would be required for the crime of criminal libel if that crime had an ordinary *mens rea* requirement; but the Court's arguments go further by focusing on whatever is the objectionable quality of the speech involved.

145. 361 U.S. 147 (1959).

146. *Id.* at 151.

147. No lower standard would have a significant effect on self-censorship. Booksellers, unless they purchase by the pound, have some idea of what books they are selling. Strict liability or no, their concern would be with that large class of books which are possible candidates for official suppression. While eliminating strict liability ensures at least minimal notice for booksellers, self-censorship of books in the grey area—books which the authors and distributors think have social value but which they fear they may be prosecuted for publishing—is likely to be significantly reduced only by providing a defense of good faith belief in the legality of what was being published. The Court in Mishkin v. New York, 383 U.S. 502 (1966), endorsed a statute which required knowledge of "the character of the material defendants attempt to distribute," and, therefore, "calculated purveyance of filth." This test seems close to the good faith belief standard, but as it was applied in *Mishkin* it is essentially a subjective "good motive" test. Indeed, a true good faith belief defense would probably preclude almost any convictions for obscenity. "Obscenity" is a concept whose elements are "unknowable" in the strongest sense. In interpreting the reach of the *Screws* statute there is ambiguity but some clear cases of violation and some standards to apply. In the obscenity area there are none. It would therefore be extraordinarily difficult to find a defendant without a legitimate good faith

The lesson of the obscenity and libel cases is the necessity of protecting important speech not only from criminal punishment but also from indirect suppression, by the use of a defense of ignorance or mistake concerning the quality of the speech that makes it punishable. For draft counseling this formula yields the good faith belief defense.

VI. The Right to Counsel and the Right to Litigate

Two aspects of the constitutional right to counsel give further support to a full-fledged good faith belief defense for the crime of draft counseling.

A. *The Registrant's Need to Receive Advice*

Draft registrants particularly need to obtain advice about their rights and duties under the law. Because of the strictness of the exhaustion of remedies rule in the Selective Service process, registrants may need counsel very early in their relationship with local boards.[148] And because of Section 10(b)(3)'s limitation on the availability of judicial review, a registrant may need advice which will include the suggestion that he "violate" the law by refusing induction in order to raise what his counselor believes are legitimate objections to Selective Service action.

The registrant has a right to seek out legal counsel about his duties under the draft law.[149] And since counseling involves matters of conscience and politics as well as law, ministers and other personal advisers besides lawyers appropriately give draft counsel. For the moment at least, since all young men have dealings with the Selective

belief defense to an obscenity charge, and no other standard meets the challenge *Smith* sets for protecting speech. *See generally* Note, *More Ado About Dirty Books*, 75 YALE L.J. 1364 (1966).

148. The rule common in administrative procedure cases, that one must pursue all internal avenues of appeal before seeking judicial relief, has been strictly applied in the area of Selective Service law. *See, e.g.*, Badger v. United States, 322 F.2d 902, 906 (9th Cir. 1963), *cert. denied*, 376 U.S. 914 (1964); Noland v. United States, 380 F.2d 1016 (10th Cir.), *cert. denied*, 389 U.S. 945 (1967). *But see* Lockhart v. United States, 1 SEL. SERV. L. REP. 3024 (9th Cir., Oct. 26, 1968) (relaxing the rule). The exhaustion of remedies doctrine is not the sole rationale for assuring the registrant counsel in his dealings with the draft machinery; for most registrants, "the Selective Service System will often appear to be an administrative obstacle course, covered with more legal pitfalls and frustrations than anything they have ever encountered in the vastness of American bureaucracy." Comment, *The Selective Service System*, 54 CALIF. L. REV. 2123-24 (1966).

149. The sixth amendment's guarantee of the right to assistance of counsel at criminal trials seems to take for granted, at the very least, the generally accepted right of all citizens to seek out legal advice in situations which have not matured into criminal trials. Tax lawyers are a ready example of legal advisors whose good faith activities, relating to their clients' civil and criminal problems with the Internal Revenue Service, are beyond question.

Service System and since the number of lawyers is limited, effective legal counsel is available to many only because lay groups and individuals undertake to give advice.[150] Thus, the position of the lay draft counselor is analogous to that of the prison writ writers to whom the Supreme Court has recently extended protection.[151]

Protecting draft counseling, then, also protects the registrant's right to receive counsel. A registrant could no more receive adequate draft advice if his counselor were subject to criminal penalties in the event he were wrong than a taxpayer could if his tax lawyer could be prosecuted for good faith but erroneous advice that no tax was owing or that no return had to be filed. The good faith belief defense guarantees to the registrant access to counselors who are free to give full

150. The Selective Service Act provides for Government Appeal Agents to be appointed for each local board to advise both registrants and the board. An agent's prescribed duties, however, place him in an impossible position for an attorney: "It shall be the duty of the government appeal agent . . . To be equally diligent in protecting the interests of the Government and the rights of the registrant in all matters." 32 C.F.R. § 1604.71(d)(5). A more satisfactory arrangement would be the appointment of lawyers to a Selective Service panel in each judicial district under the Criminal Justice Act, 18 U.S.C. § 3006A (Supp. III, 1968), a practice which has already met with considerable success in the Northern District of California. 1 SEL. SERV. L. REP. 4 (1968). From this panel an attorney could then be designated to counsel any indigent registrant who requested assistance. Although this would represent earlier involvement of appointed counsel than has been typical in past criminal matters, almost any contact with the Selective Service System can bring a registrant to a "critical stage" in his relation to the government. The appointment of counsel at an early stage would bring the position of the indigent registrant into symmetry with that of a registrant who can afford an advisor to protect his rights.

151. Johnson v. Avery, 393 U.S. 483 (1969). In an opinion by Justice Fortas which appears to rest on both the Constitution and the federal habeas corpus statute, the Supreme Court held that until Tennessee provides "some reasonable alternative . . . it may not validly enforce a regulation . . . banning inmates from furnishing . . . assistance to other prisoners . . ." in preparing writs. 393 U.S. at 490.

The majority opinion in *Johnson* indicates that the Court is prepared to permit some lay counseling; Justice Douglas's concurrence pulls out all stops. Using the writ-writer as an "acute" example, he examines the need for lay advocates to assist ordinary citizens "to process a claim or even to make a complaint" in "[t]he increasing complexities of our governmental apparatus at both the local and the federal levels . . . ." 393 U.S. at 491 (concurring opinion). The crisis presented by the shortage of legal counsel led Douglas to conclude that "[l]aymen—in and out of prison—should be allowed to act as 'next friend' to any person in the preparation of any paper or document or claim, so long as he does not hold himself out as practicing law or as being a member of the Bar." 393 U.S. at 498 (concurring opinion). Justices White and Black, dissenting from the majority's view that the assistance of fellow inmates provides most prisoners with adequate access to the courts, agreed with Justice Douglas "that it is neither practical nor necessary to require the help of lawyers." 393 U.S. at 502 (dissenting opinion).

This broader definition of the right to counsel is also appropriate because much counseling takes place against a background of political or draft protest groups, whose activities are shielded by the right of association. The right to counsel discussed here, like the right to advocate litigation discussed *infra*, is a cloth woven from both first and sixth amendment threads. It should also be apparent that while much of the counseling discussed in this Comment takes place on an individual, face-to-face basis, some of it is of a general nature, for instance, a political speech addressed as "advice" to all registrants who meet a particular description.

and honest advice without fear of prosecution for giving registrants the benefit of their beliefs about the draft law.

B. *The Counselor's Right to Advocate Litigation*

The registrant's right to effective counsel from the earliest stages of his contact with the Selective Service System has a counterpart in the counselor's right to advise and facilitate litigation by registrants to seek redress of legal and political grievances against the draft. The good faith belief defense defines the best standard by which to judge the appropriateness of an assertion of a right to advocate litigation in a particular case.

In a series of recent cases—*NAACP v. Button, Brotherhood of Railway Trainmen,* and *United Mine Workers*[152]—the Supreme Court has elucidated the right of people to organize for the purposes of advising others to initiate law suits in vindication of apparent rights and aiding them in prosecuting their suits. Though the core right to advise litigation is grounded in the right of any person to instigate a lawsuit, the Court's formulation rests on a recognition of the relationship between the design of the first amendment and the reasons for group litigation. First, the Court has recognized the importance and special appropriateness of the courts as an avenue for free communication. The good faith draft counselor, like the NAACP in *Button,* seeks to use the courts to make possible "the distinctive contribution of a minority group to the ideals and beliefs of our society."[153] His arguments concerning the legality of the war in Vietnam and the draft raise issues of compelling national importance. The use of the courts may make his positions more widely acceptable.[154]

152. NAACP v. Button, 371 U.S. 415 (1963); Brotherhood of Railroad Trainmen v. Virginia *ex rel.* Va. State Bar, 377 U.S. 1 (1964); United Mine Workers of America v. Illinois State Bar Ass'n, 389 U.S. 217 (1967).

153. 371 U.S. at 431.

154. *See also* Zimroth, *Group Legal Services and the Constitution,* 76 YALE L.J. 966, 988 (1967): "[F]ree speech performs a legitimating function. People who have been allowed to participate freely in a discussion will be more willing to accept the ultimate decision." The character of some of the current draft resistance (the burning of draft cards and confrontations with the police) indicates that many Americans, believing that their position has not received adequate attention from the government, have repudiated the decisions of that government. During the *Spock* trial, Rev. Coffin explained the comments he had made outside the Justice Department on October 20, 1967, to the effect that in tendering a briefcase full of draft cards to an assistant attorney general he hoped to provoke a "legal confrontation with the proper agency of our government." Spock Appendix 1638. He testified:

> I meant by that very simply that if the government would refuse to have a good court case on the legality of the war and the constitutionality of the draft law, then out of frustration a great many people in America inevitably would begin to turn from the politics of hope, if you will, to the politics of despair.

Id. 1639.

In addition, "under the conditions of modern government, litigation may well be the sole practical avenue open to a minority to petition for redress of grievances."[155] While the Court in *Button* was concerned with politically weak (and often disenfranchised) Southern blacks, similar reasoning was relied on in *United Mine Workers*. It is clear, therefore, that the possession of economic or political strength and the possibility of pursuing grievances through other avenues do not foreclose the use of the courts when a political viewpoint has a legal counterpart.

The counseling of Selective Service registrants is perhaps the paradigmatic political act to which the right to advocate litigation should be applicable. The need to protect citizens' rights to free speech and association seems more compelling in an area of general national importance, such as the debate concerning Vietnam, than where the particular economic interests of a relatively small group are at issue. The Court in *United Mine Workers* held that the state could not enforce laws which would not only weaken the economic rights of the union members, but would seriously detract from the union's ability to organize by preventing it from delivering to the workers the benefits for which it had lobbied.[156] An organization's right to advocate and promote litigation is thus an inherent part of its right to organize.[157]

Justice Roberts's opinion in *Keegan v. United States* stressed the evidence which showed defendants' good faith intention to bring a "test case." That the registrant should find himself, at the counselor's suggestion, in the posture of defendant rather than plaintiff (as in the situations to which the right to litigate has recently been applied) is not a difficulty of his own making. It is Congress, in Section 10(b)(3), which has determined that he can appear in court only as a defendant. While the distinction may permit Congress to prohibit the counseling

155. NAACP v. Button, 371 U.S. at 429-30.

156. In encouraging vigorous and consistent litigation through its attorneys, the union was attempting to protect the workmen's compensation scheme which it had persuaded the state legislature to adopt. 389 U.S. at 219.

157. While the groups involved in *Button* and its siblings were undeniably more formal associations than most draft counseling groups pretend to be, there is no legitimate distinction between such advice and that provided by individuals or loose associations. Nevertheless, since the most active groups of counselors—people with legal, moral or political objections to the draft—are, in fact, often only informally organized, it might be objected that they should raise their challenges directly as individuals rather than through the registrants. As a practical matter such a course is virtually impossible since the rules of standing alone would keep the counselor out of court. As a theoretical matter the objection misses the point of the right to organize for litigation, which is to facilitate free and effective expression of ideas and beliefs.

of Selective Service violations where the counselor knows his objections are legally frivolous, any lesser standard than the good faith belief defense would permit serious inroads upon the first amendment right to organize around legal grievances enunciated in *Button*.[158]

VII. Conclusion

The good faith belief defense suggested here may be briefly stated: a counselor may be convicted only if he knew that the conduct he counseled was illegal—and that the law in question was not vulnerable to court attack[159]—or if he recklessly disregarded the illegality of the counseled conduct. The recklessness limitation, however, must be kept narrow if it is not to swallow the defense. Foolish but actual belief in legality would be protected even if the counsel were not in the form of a legal argument and were motivated by political or moral considerations.[160] If the counsel were in any way oriented toward a court test of the conduct's legality, the counselor should not be deemed reckless. Only the counselor for whom testing legality is not important and who merely hopes that the activity counseled is not illegal would not be protected by the defense. He would have recklessly disregarded the activity's probable illegality because he acted without intending to secure a judicial vindication of the counseled conduct.[161]

When the good faith belief defense is raised, it need not, of course, always be accepted. The context in which the claim is raised may give the jury grounds to disbelieve the defendant.[162] A counselor who raises

158. The first amendment would, however, be a hollow promise if it left government free to destroy or erode its guarantees by indirect restraints so long as no law is passed that prohibits free speech, press, petition or assembly as such. We have therefore repeatedly held that laws which actually affect the exercise of these vital rights cannot be sustained merely because they were enacted for the purpose of dealing with some evil within the State's legislative competence, or even because the laws do in fact provide a helpful means of dealing with such an evil.
United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217 (1967).

159. Whether some court in the hierarchy of appeals will strike down a particular legal obligation is not, of course, always subject to certain knowledge. The knowledge referred to in the text should therefore be taken to include the following notion from the MODEL PENAL CODE § 2.02(7) (Proposed Official Draft 1962): "When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist."

160. *Cf.* Dworkin, *On Not Prosecuting Civil Disobedience*, N.Y. REV. OF BOOKS, June 6, 1968, at 14.

161. A motive test of this type would raise problems of proof, which would be mitigated by the evidence that the speech and its context would give. The test would give body to the "actual belief" standard, whose hazards are discussed by Duke, *Prosecutions for Attempts to Evade Income Tax*, 76 YALE L.J. 1, 4-5 (1966).

162. *See* Morissette v. United States, 342 U.S. 246, 276 (1952).

a belief about the counseled activity's legality for the first time at his trial may be suspect for not having discussed it in his original counsel. Similarly, a counselor who flies in the face of court decisions may forfeit his claim to credibility.[163] Although the grounds for his advice need not be found to be "reasonable," evidence of their reasonableness is relevant to the central issue, the counselor's actual beliefs.

163. None of the major claims of the antiwar protestors has been disposed of by the Supreme Court, with the exception of the draft card mutilation requirement, upheld after the indictment of Dr. Spock and his co-defendants. United States v. O'Brien, 391 U.S. 367 (1968). Some of the objections are: (1) Peacetime conscription is illegal, *cf.* Selective Draft Law Cases, 245 U.S. 366 (1918); (2) The draft denies the individual the right not to commit war crimes, *cf.* Mitchell v. United States, 386 U.S. 972 (1967) (Douglas, J., dissenting from the denial of certiorari); (3) The war in Vietnam is illegal, as is, therefore, compulsion to fight in it, *cf.* Mora v. McNamara, 389 U.S. 934 (1967) (Stewart and Douglas, JJ., dissenting from the denial of certiorari); (4) The classification system denies equal protection and establishes religion, *see* United States v. Sisson, 297 F. Supp. 902 (W.D. Mass. 1969). For a similar catalogue, see Griffiths, Book Review, 77 YALE L.J. 827 n.3 (1968).